# Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NOS D-01–21 OF 2008 AND D-01–22 OF 2008
JAMES FOONG FCJ, ABDULL HAMID EMBONG AND ABDUL MALIK ISHAK JJCA
26 JUNE 2009

*Civil Procedure — Action — Cause of action — Cause of action based on fraud and conspiracy to defraud — Defendants sued jointly and severally — Whether death of one defendant would bar continuance of action against remaining defendants*

*Civil Procedure — Damages — Assessment of damages — Action based on fraud and conspiracy to defraud — How damages reckoned*

*Civil Procedure — Damages — Exemplary damages — Reckoning of exemplary damages, factors for consideration*

*Civil Procedure — Judgment — Default of appearance — Judgment in default of appearance obtained after trial — Setting aside, principles applicable — Factors to be considered — Whether absence of applicant predominant consideration*

*Civil Procedure — Parties — Joint tortfeasors — Cause of action based on fraud and conspiracy to defraud — Whether death of one tortfeasor would bar continuance of action against remaining tortfeasors*

*Equity — Estoppel — Estoppel by election — Scope and nature of — Circumstances when applicable*

*Evidence — Burden of proof — Fraud alleged in civil case — Whether higher standard of proof than balance of probabilities applicable*

*Tort — Damages — Assessments — Action based on fraud and conspiracy to defraud — How damages reckoned*

*Tort — Damages — Exemplary damages — Reckoning of exemplary damages, factors for consideration*

Neither the defendants nor their counsel were present when the plaintiffs' civil action was called for hearing in the High Court on 13 January 2008. The High Court proceeded in the absence of the defendants and/or their counsel and heard evidence in support of the plaintiffs' claim. After deliberation, the High Court allowed the plaintiffs' claim. The plaintiffs were awarded general damages, exemplary damages, interest and costs. The defendants' counsel applied the very next day to set aside the judgment under O 35 r 1 of the Rules of the High Court 1980, which application was heard and dismissed by the High Court. The defendants subsequently appealed against the decision of the High Court of 13 January 2008 ('the decision appeal') and against the decision of the High Court dismissing their application to set aside the judgment ('the JID appeal'). The defendants appealed to the Court of Appeal. The Court of Appeal refused the defendants' application to consolidate both appeals, and instead ordered the appeals be heard one after another beginning with the JID appeal. At the commencement of the appeal, the plaintiffs' counsel raised a preliminary objection and prayed that the defendants' decision appeal be struck out. The plaintiffs' counsel contended that the defendants were estopped from pursuing their decision appeal since they had elected to pursue the JID appeal.

**Held**, dismissing the appeal with costs:

(1) (per **James Foong FCJ**) For estoppel by election to apply, there must first be an election made by one party and responded by the other who was encouraged by this election to adopt or persevere a line of conduct which he otherwise would have abandoned or modified, or he has changed his tactics which he would not have adopted if not for the election. In short, there must be a positive act of election corresponded by a reaction from the other side to the act. However, in the instant case there was no evidence that the defendants had made any election in the first place. They had proceeded with the two appeals simultaneously. There was also no evidence that the plaintiffs were encouraged by any election made by the defendants to alter their conduct of the case. The plaintiffs in fact were prepared to take on the defendants in both the appeals. This principle of estoppel, being equitable in nature should only be used where justice dictates and should only be applied according to the facts and circumstances of each particular case and its operation dependent upon the conduct of the parties (see paras 10 & 16); *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors and another appeal* [2007] 1 MLJ 225; *Meng Leong Development Pte Ltd v Jip*

*Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 and *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 referred; *Yogananthy a/l AS Thambaiya lwn Idris Osman* [2006] 2 MLJ 101 distinguished.

(2) (per **James Foong FCJ**) In setting aside a judgment in default due to non-appearance by a party, a distinction ought to be drawn between an application where the judgment was obtained without a trial having proceeded, and an application where the judgment was obtained after a trial. Where the judgment is entered after trial, different rules will apply. The factors to be considered when dealing with such an application (default judgment after trial) are as identified in the English case of *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 375, as applied locally in *Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 and *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267 (see paras 17–18); *Evans v Bartlam* [1937] AC 473 and *Burns v Kondel* [1971] 1 Lloyd's Rep 444 distinguished; *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 3752 followed; *Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 and *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267 referred.

(3) (per **James Foong FCJ**) The defendants' absence was the predominant consideration. Although the defendants sought to lay the blame on their solicitor's previous employee who had allegedly failed to diarise the hearing date, an employer is responsible for the action of his employee, and thus the conduct of the defendants' solicitors also bound the defendants. Further, the failure to diarise a hearing date is not an excuse that has been tolerated by the courts. The defendants' solicitors indifference or lack of interest in managing their firm properly by failing to devise a system to monitor and check whether the duties or instructions given to its employees were carried out, would amount to a deliberate act or defiance of a court order if such order were given to its employee and not complied with. In the instant case, the plaintiffs had also adduced unrebutted evidence, that they had sent a letter of reminder to the defendants' counsel concerning the hearing date (see paras 20–23); *Mohd Yusof Mohamad v Electrolux Home Centres Sdn Bhd* [1999] 2 CLJ 866; *Asia Commercial Finance (M) Bhd v Pasadena Properties Development & Ors* [1991] 1 MLJ 111) and *Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344 referred.

(4) (per **James Foong FCJ**) In the instant case, the plaintiffs' causes of action were based on fraud and conspiracy to defraud. Concerning the fraud, the plaintiffs had claimed against the defendants jointly and/or severally. Thus, each of the defendants was individually liable to the

plaintiffs. There was no question of the first and third defendants being released by the plaintiffs on account of the death of the second defendant. In the cause of action for conspiracy, all the defendants were joint tortfeasors. Even when one of them died, the action would subsist against the surviving tortfeasors without the need to substitute the deceased defendant. In short, the action would continue against the remaining tortfeasors. The first and third defendants thus remained liable to the plaintiffs and had not been discharged. Further, there was no record that the plaintiffs had withdrawn their claim against the deceased second defendant. It was merely the High Court's own discretion to refuse awarding any damages against the second defendant (see paras 29–30).

(5) (per **James Foong FCJ**) In a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants, after taking into account the foreseeability factor. In the instant case, the plaintiffs' witness had given credible and uncontradicted evidence on how the plaintiffs' losses were arrived at and this had been accepted by the High Court. The High Court judge had applied the correct principles in assessing general damages, which was also substantiated by cogent evidence (see paras 36–37).

(6) (per **James Foong FCJ**) An award of exemplary damages ought to be moderate. The resources and conduct of the parties, quantum of the compensatory award, and gravity of the wrong are also factors to be considered. In the instant case, considering the circumstances and all other relevant factors the trial judge's award of exemplary damages was justified (see para 38).

(7) In the instant case, the High Court had declared that even if proof beyond reasonable doubt was applied, its decision would still be the same. This was a clear indication that the High Court had considered and applied the higher standard of proof in concluding that the defendants were liable to the plaintiffs (see para 43).

(8) (per **James Foong FCJ**) The documents filed by the plaintiffs in their additional bundle of documents were admitted by the court when they were tendered by the plaintiffs during the trial. Once admitted the documents were considered evidence. As for the oral evidence, such evidence was properly admitted by the court (see para 45).

(9) (per **James Foong FCJ**) Although the defendants had taken prompt and immediate action to set aside the default judgment, this paled in significance when considered in the light of the very weak excuse given for the defendants' absence in court coupled with no real prospect of

success in their defence. Further, it is public policy that there should be finality in an action rather than having to engage the court to conduct two trials instead of one (see para 46).

(10) (per **Abdul Malik Ishak JCA** dissenting in part) The plaintiffs' preliminary objection ought to be unanimously dismissed forthwith. There were no principles of law that required the defendants to be put to an election of their rights. Both the defendants' appeals were in respect of different matters, issues and questions of law. Both decisions of the High Court were also appealable under ss 3 and 68 of the Courts of Judicature Act 1964 (see paras 60, 62, & 64).

(11) (per **Abdul Malik Ishak JCA** dissenting in part) When one party fails to appear, the High Court may proceed with the trial in the absence of that party. However, the party which appears before the court would have to prove its case on any issue for which it bore the burden of proof. In the instant case, the burden of proof was on the plaintiffs to prove their case notwithstanding the absence of the defendants (see paras 72–73); *Liew Geok Lan (f) v John Loh* [1993] 3 CLJ 158; *Barker v Furlong* [1891] 2 Ch 172 and *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 referred.

(12) (per **Abdul Malik Ishak JCA** dissenting in part) In an application to set aside a judgment in default of appearance by the defendant after trial, different considerations will apply compared to an application to set aside such default judgment before trial. Although the court has an unfettered discretion to grant or refuse an application to set aside a judgment in default of appearance after a trial, there must be some material on which the court can exercise its discretion in favour of the applicant. The predominant consideration is not whether there is a defence on the merits but rather the reason why the defendant had absented itself. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant factors to be considered in such an application include: (i) the defendant's prospects of success in a retrial; (ii) the delay in applying to set aside the judgment; (iii) the conduct of the defendant; (iv) whether the successful party would be prejudiced by the judgment being set aside; and (v) the public interest in there being an end to litigation (see para 80); *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372 and *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16 followed.

(13) (per **Abdul Malik Ishak JCA** dissenting in part) In the instant case, the defendants' solicitors' oversight of the trial date was a genuine mistake and not deliberate. The High Court judge had erred in law when he failed to accept the reasons for the absence of the defendants and their solicitors on the date of hearing. Their absence was not intentional or deliberate (see para 101).

(14) (per **Abdul Malik Ishak JCA** dissenting in part) The allegations of fraud, cheating and conspiracy against the first defendant hinged entirely on the actions of the second defendant — deceased at the time of trial — as the representative, agent or employee of the first defendant. With the demise of the second defendant it was doubtful whether the burden of proof of conspiracy, fraud and cheating had been adequately proved by the plaintiffs notwithstanding the absence of the defendants on the hearing date. With the second defendant's demise, the case against the first and third defendants could not be sustained. Further, as a joint tortfeasor, when the second defendant died, that was the end of the matter. The plaintiffs had also abandoned their claim against the second defendant. Thus, it was not possible for the High Court to decide the case against the defendants (see paras 105–107, 112–113).

(15) (per **Abdul Malik Ishak JCA** dissenting in part) The defendants had not delayed in applying to set aside the default judgment. They had acted promptly and timeously in filing their application (see para 114).

(16) (per **Abdul Malik Ishak JCA** dissenting in part) The plaintiffs' claim was for damages and there were 354 plaintiffs in the instant case. Each one had to individually prove his or her claim before the High Court. There was no 'class action' suit in Malaysia. Neither was this action filed as a representative action. The High Court's decision was not based upon any cogent evidence, either oral or through documents (see para 116).

(17) (per **Abdul Malik Ishak JCA** dissenting in part) In the instant case, to allow the decision appeal and remit the case back to the High Court for retrial would not deprive the defendants their opportunity to defend the action whilst at the same time the plaintiffs would still have the opportunity to continue with their claim. To deprive the defendants the opportunity of defending the claim would likely lead to a miscarriage of justice in the instant case (see paras 117 & 119); *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 followed.

(18) (per **Abdul Malik Ishak JCA** dissenting in part) In the instant case, there was an improper judicial appreciation of the evidence by the High Court judge. The High Court had failed to test the evidence of witnesses against the probabilities of the case since both parties were not in court to present their versions. The appellate court was thus free to reverse the findings of the trial court, which was plainly wrong in the instant case. The trial judge had misdirected himself and failed to judicially appreciate the evidence (see paras 120–122).

**[Bahasa Malaysia summary**

Defendan-defendan mahupun peguam mereka tidak hadir apabila tindakan

sivil plaintif-plaintif dipanggil untuk dibicarakan di Mahkamah Tinggi pada 13 Januari 2008. Mahkamah Tinggi telah bermula tanpa kehadiran defendan-defendan dan/atau peguam mereka dan mendengar keterangan yang menyokong tuntutan plaintif-plaintif. Selepas dipertimbangkan, Mahkamah Tinggi telah membenarkan tuntutan plaintif-plaintif. Plaintif-plaintif telah diawardkan ganti rugi am, ganti rugi teladan, faedah dan kos. Pada keesokan hari, peguam defendan-defendan telah memohon untuk mengenepikan penghakiman di bawah A 35 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980, yang mana permohonan itu telah didengar dan ditolak oleh Mahkamah Tinggi. Defendan-defendan seterusnya telah merayu terhadap keputusan Mahkamah Tinggi bertarikh 13 Januari 2008 itu ('keputusan rayuan') dan terhadap keputusan Mahkamah Tinggi yang menolak permohonan mereka untuk mengetepikan penghakiman ('rayuan PI'). Defendan-defendan telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan telah menolak permohonan defendan-defendan untuk menggabungkan kedua-dua rayuan, dan sebaliknya memerintahkan rayuan-rayuan itu didengar satu demi satu bermula dengan rayuan PI itu. Pada permulaan rayuan tersebut, peguam plaintif-plaintif telah menimbulkan bantahan awal dan memohon agar rayuan keputusan defendan-defendan dibatalkan. Peguam plaintif-plaintif menegaskan bahawa defendan-defendan diestopkan daripada meneruskan rayuan keputusan mereka memandangkan mereka telah memilih untuk meneruskan dengan rayuan PI itu.

**Diputuskan**, menolak rayuan dengan kos:

(1) (oleh **James Foong HMP**) Untuk menggunapakai estopel melalui pilihan, pertama perlu ada pilihan yang dibuat oleh satu pihak dan dibalas oleh yang lain atas galakan pilihan ini untuk menggunakan atau memerlukan ketekunan berlakuan yang dia sebaliknya akan batal atau ubah, atau dia telah menukar taktiknya yang dia tidak akan gunakan jika bukan kerana pilihan itu. Pendek kata, perlu ada tindakan pilihan positif yang disambut dengan tindak balas daripada pihak satu lagi untuk bertindak. Walau bagaimanapun, dalam kes ini tiada keterangan bahawa defendan-defendan telah membuat apa-apa pilihan pada mulanya. Mereka telah meneruskan dengan dua rayuan tersebut serentak. Tiada juga keterangan bahawa plaintif-plaintif digalakkan melalui apa-apa pilihan yang dibuat oleh defendan-defendan untuk mengubah pengendalian mereka terhadap kes tersebut. Bahkan plaintif-plaintif telah bersedia untuk menentang defendan-defendan dalam kedua-dua rayuan. Prinsip estopel ini, yang bersifat ekuiti hanya patut digunakan di mana keadilan diperlukan dan hanya patut digunakan menurut fakta dan keadaan untuk setiap kes tertentu dan pelaksanaannya bergantung kepada perlakuan pihak-pihak (lihat perenggan 10 & 16); *Annie Quah Lay Nah v Syed Jafer Properties Sdn*

*Bhd & Ors and another appeal* [2007] 1 MLJ 225; *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 dan *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 dirujuk; *Yogananthy a/l AS Thambaiya lwn Idris Osman* [2006] 2 MLJ 101 dibeza.

(2) (oleh **James Foong HMP**) Dalam mengenepikan penghakiman ingkar akibat daripada ketidakpatuhan oleh satu pihak, perbezaaan patut dibuat antara permohonan di mana penghakiman yang diperoleh tanpa perbicaraan yang telah dimulakan, dan permohonan di mana penghakiman telah diperoleh selepas perbicaraan. Di mana penghakiman telah dimasukkan selepas perbicaraan, kaedah-kaedah berbeza terpakai. Faktor-faktor yang perlu dipertimbangkan semasa mengendalikan permohonan sebegini (penghakiman ingkar selepas perbicaraan) dikenalpasti dalam kes Inggeris *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372, seperti mana diguna pakai di sini dalam kes *Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 dan *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267 (lihat perenggan 17–18); *Evans v Bartlam* [1937] AC 473 dan *Burns v Kondel* [1971] 1 Lloyd's Rep 444 dibeza; *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 375 diikut; *Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 dan *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267 dirujuk.

(3) (oleh **James Foong HMP**) Ketidakhadiran defendan-defendan merupakan pertimbangan utama. Meskipun defendan-defendan telah cuba meletakkan tanggungjawab terhadap kesalahan bekas pekerja peguam-peguam mereka yang dikatakan telah gagal memasukkan tarikh perbicaraan ke dalam diari, seorang majikan bertanggungjawab terhadap tindakan pekerjanya, dan oleh itu perlakuan peguam-peguam defendan-defendan juga mengikat defendan-defendan. Tambahan pula, kegagalan untuk memasukkan tarikh perbicaraan ke dalam diari bukan alasan yang boleh diterima oleh mahkamah. Peguam-peguam defendan-defendan yang bersikap tidak mengambil peduli atau kurang berminat menguruskan firma mereka dengan sewajarnya kerana gagal mewujudkan sistem untuk mengawal dan memeriksa sama ada tugas atau arahan yang diberikan kepada pekerjanya telah dilaksanakan, akan membentuk tindak yang disengajakan atau mengingkari perintah mahkamah jika perintah sedemikian telah diberikan kepada pekerjanya dan tidak dipatuhi. Dalam kes ini, plaintif-plaintif juga telah mengemukakan keterangan yang tidak dipatahkan, bahawa mereka telah menghantar surat peringatan kepada peguam defendan-defendan berkenaan tarikh perbicaraan tersebut (lihat perenggan 20–23); *Mohd Yusof Mohamad v Electrolux Home Centres Sdn Bhd* [1999] 2 CLJ 866;

*Asia Commercial Finance (M) Bhd v Pasadena Properties Development & Ors* [1991] 1 MLJ 111) dan *Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344 dirujuk.

(4) (oleh **James Foong HMP**) Dalam kes ini, kausa-kausa tindakan plaintif-plaintif adalah berdasarkan fraud dan konspirasi untuk menipu. Berkaitan fraud, plaintif-plaintif telah menuntut terhadap defendan-defendan secara bersama dan/atau berasingan. Oleh itu, setiap daripada defendan-defendan bertanggungjawab secara berasingan terhadap plaintif-plaintif. Tiada persoalan yang defendan-defendan pertama dan ketiga telah dibebaskan oleh plaintif-plaintif atas dasar kematian defendan kedua. Dalam kausa tindakan untuk konspirasi, kesemua defendan merupakan pelaku tort bersama. Jikapun apabila salah seorang daripada mereka meninggal dunia, tindakan itu masih kekal terhadap pelaku tort yang hidup tanpa perlu menggantikan defendan si mati. Defendan-defendan pertama dan ketiga oleh itu tetap bertanggungjawab terhadap plaintif-plaintif dan tidak dilepaskan. Bahkan, tiada rekod bahawa plaintif-plaintif telah menarik balik tuntutan mereka terhadap defendan kedua si mati. Hanya budi bicara Mahkamah Tinggi yang enggan mengawardkan apa-apa ganti rugi terhadap defendan kedua (lihat perenggan 29–30).

(5) (oleh **James Foong HMP**) Dalam tuntutan berasaskan fraud dan konspirasi untuk menipu, plaintif-plaintif sepatutnya berhak terhadap kerugian yang dialami akibat kilanan terhadap pendapatan atau keuntungan mereka yang diakibatkan oleh kesalahan yang dilakukan oleh defendan-defendan, setelah mengambilkira faktor kebolehramalan. Dalam kes ini, saksi plaintif-plaintif telah memberikan keterangan yang oleh dipercayai dan tidak bercanggah tentang bagaimana plaintif-plaintif mendapat kerugian tersebut dan ini telah diterima oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi telah menggunakan prinsip-prinsip yang betul dalam menaksir ganti rugi am, yang juga disahkan oleh keterangan yang meyakinkan (lihat perenggan 36–37).

(6) (oleh **James Foong HMP**) Award ganti rugi teladan sepatutnya sederhana. Sumber dan perlakuan pihak-pihak, kuantum award pampasan, dan seriusnya kesalahan juga faktor-faktor yang perlu dipertimbangkan. Dalam kes ini, dengan mengambilkira keadaan dan semua faktor lain, award ganti rugi teladan oleh hakim bicara tersebut adalah berjustifikasi (lihat perenggan 38).

(7) (oleh **James Foong HMP**) Dalam kes ini, Mahkamah Tinggi telah mengisytiharkan bahawa jikapun bukti melampaui keraguan munasabah digunakan, keputusannya akan masih sama. Ini jelas menandakan bahawa Mahkamah Tinggi telah mempertimbangkan dan menggunakan piawai bukti yang lebih tinggi dalam memutuskan

A bahawa defendan-defendan bertanggungjawab terhadap plaintif-plaintif (lihat perenggan 43).

(8) (oleh **James Foong HMP**) Dokumen-dokumen yang difailkan oleh plaintif-plaintif dalam ikatan dokumen tambahan mereka telah
B diterima oleh mahkamah apabila dikemukakan oleh plaintif-plaintif semasa perbicaraan. Setelah diterima dokumen-dokumen tersebut dianggap sebagai keterangan. Berhubung keterangan lisan, keterangan itu telah diterima sewajarnya oleh mahkamah (lihat perenggan 45).

C (9) (oleh **James Foong HMP**) Meskipun defendan-defendan telah mengambil tindakan tepat dan segera untuk mengetepikan penghakiman ingkar itu, ini tidak penting apabila dipertimbangkan berdasarkan alasan lemah yang diberikan untuk ketidakhadiran defendan-defendan di mahkamah dan juga tiadanya prospek sebenar
D bahawa mereka akan berjaya dalam pembelaan mereka. Tambahan pula, ia adalah polisi awam bahawa kemuktamadan patut ada dalam suatu tindakan daripada mengkehendaki mahkamah menjalankan dua pendengaran (lihat perenggan 46).

(10) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Bantahan
E awal plaintif-plaintif sepatutnya ditolak sebulat suara. Tiada prinsip undang-undang yang menghendaki defendan-defendan memilih hak-hak mereka. Kedua-dua rayuan defendan-defendan adalah berkaitan perkara-perkara, isu-isu dan persoalan-persoalan perundangan yang berbeza. Kedua-dua keputusan Mahkamah Tinggi
F juga boleh dirayu di bawah ss 3 dan 68 Akta Mahkamah Kehakiman 1964 (lihat perenggan 60, 62 & 64).

(11) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Apabila satu pihak gagal untuk hadir, Mahkamah Tinggi boleh memulakan
G perbicaraan dengan ketidakhadiran pihak tersebut. Walau bagaimanapun, pihak yang hadir di hadapan mahkamah perlu membuktikan kesnya atas apa-apa isu yang mana beban bukti diletakkan. Dalam kes ini beban bukti terletak pada plaintif-plaintif untuk membuktikan kes mereka meskipun dengan ketidakhadiran
H defendan-defendan (lihat perenggan 72–73); *Liow Geok Lan (f) v John Loh* [1993] 3 CLJ 158; *Barker v Furlong* [1891] 2 Ch 172 dan *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 dirujuk.

(12) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Dalam
I permohonan untuk mengetepikan penghakiman ingkar kehadiran oleh defendan selepas perbicaraan, pertimbangan berbeza akan digunakan berbanding dengan permohonan untuk mengetepikan penghakiman ingkar sebelum perbicaraan. Meskipun mahkamah mempunyai budi bicara yang tidak terhad untuk memberi atau menolak permohonan

untuk mengetepikan penghakiman ingkar kehadiran selepas perbicaraan, perlu ada perkara yang mana mahkamah boleh melaksanakan budi bicaranya menyebelahi pemohon. Pertimbangan utama adalah bukan sama ada terdapat pembelaan atas merit tetapi lebih kepada sebab kenapa defendan tidak menghadirkan diri. Jika ketidakhadiran itu disengajakan dan bukan disebabkan kemalangan atau kesilapan, mahkamah tidak mungkin membenarkan perbicaraan semula. Faktor-faktor lain yang perlu dipertimbangkan dalam permohonan sebegini termasuklah: (i) prospek kejayaan defendan dalam perbicaraan semula; (ii) kelewatan memohon untuk mengetepikan penghakiman; (iii) perlakuan defendan; (iv) sama ada pihak yang berjaya akan diprejudiskan oleh penghakiman yang diketepikan; dan (v) kepentingan awam yang akan menamatkan litigasi (lihat perenggan 80); *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372 dan *Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16 diikut.

(13) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Dalam kes ini, kesilapan peguam-peguam defendan-defendan tentang tarikh perbicaraan merupakan kesilapan yang tulen dan bukan disengajakan. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang apabila beliau gagal untuk menerima alasan-alasan ketidakhadiran defendan-defendan dan peguam-peguam mereka pada tarikh perbicaraan. Ketidakhadiran mereka bukan disengajakan (lihat perenggan 101).

(14) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Pengataan-pengataan tentang fraud, penipuan dan konspirasi terhadap defendan pertama keseluruhannya bergantung kepada tindakan-tindakan defendan kedua — yang telah meninggal dunia pada masa perbicaraan — sebagai wakil, ejen atau pekerja defendan pertama. Dengan kematian defendan kedua ia diragui sama ada beban bukti konspirasi, fraud dan penipuan telah dibuktikan dengan secukupnya oleh plaintif-plaintif meskipun dengan ketidakhadiran defendan-defendan pada tarikh perbicaraan itu. Dengan kematian defendan kedua, kes terhadap defendan-defendan pertama dan ketiga tidak boleh dikekalkan. Tambahan pula, sebagai pelaku tort bersama, apabila defendan kedua meninggal dunia, perkara itu tamat di situ. Plaintif-plaintif juga telah menghentikan tuntutan mereka terhadap defendan kedua. Oleh itu, ia tidak mustahil untuk Mahkamah Tinggi memutuskan kes itu terhadap defendan-defendan (lihat perenggan 105–107, 112–113).

(15) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Defendan-defendan tidak lewat dalam memohon untuk mengetepikan

penghakiman ingkar itu. Mereka telah bertindak dengan segera dan mengikut masa yang ditetapkan dalam memfailkan permohonan mereka (lihat perenggan 14).

(16) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Tuntutan plaintif-plaintif adalah untuk ganti rugi dan terdapat 354 plaintif-plaintif dalam kes ini. Setiap seorang daripada mereka perlu membuktikan tuntutan mereka di hadapan Mahkamah Tinggi. Tiada guaman 'class action' di Malaysia. Tindakan ini juga tidak difailkan sebagai tindakan representasi. Keputusan Mahkamah Tinggi tidak berasaskan apa-apa keterangan yang meyakinkan, sama ada secara lisan atau melalui dokumen (lihat perenggan 116).

(17) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Dalam kes ini, untuk membenarkan keputusan rayuan dan meremit balik kes kepada Mahkamah Tinggi untuk perbicaraan semula tidak akan menafikan defendan-defendan peluang mereka untuk membela tindakan itu dan pada masa yang sama plaintif-plaintif juga masih mempunyai peluang untuk meneruskan tuntutan mereka. Untuk menafikan peluang defendan-defendan membela tuntutan itu mungkin akan membawa kepada ketidakadilan dalam kes ini (lihat perenggan 117 & 119); *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 diikut.

(18) (oleh **Abdul Malik Ishak HMR** menentang sebahagiannya) Dalam kes ini, hakim Mahkamah Tinggi tidak menghargai secara kehakiman keterangan tersebut. Mahkamah Tinggi telah gagal untuk menguji keterangan saksi-saksi terhadap kebarangkalian kes memandangkan kedua-dua pihak tidak berada di mahkamah untuk mengemukakan versi-versi mereka. Mahkamah rayuan dengan itu bebas untuk mengakaskan penemuan-penemuan mahkamah perbicaraan, yang jelas salah dalam kes ini. Hakim perbicaraan telah salah arah dan gagal untuk menghargai secara kehakiman keterangan tersebut (lihat perenggan 120–122).]

**Notes**

For a case on joint tortfeasors, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5076.

For cases on assessment of damages under civil procedure, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2261–2281.

For cases on assessment of damages under tort, see 12 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 158–166.

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 43–58.

For cases on default of appearance, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3839–3880.

For cases on estoppel by election generally, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2693–2713.

For cases on exemplary damages under civil procedure, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2283–2286.

For cases on exemplary damages under tort, see 12 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 192–194.

For cases on fraud alleged in civil case, see 7 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 530–547.

**Cases referred to**

*Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 (refd)

*Ang Gin Lee v PP* [1991] 1 MLJ 498, SC (refd)

*Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, FC (refd)

*Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225; [2007] 1 CLJ 1, CA (refd)

*Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111; [1990] 1 CLJ (Rep) 606, HC (folld)

*Barker v Furlong* [1891] 2 Ch 172 (refd)

*Bell v The Midland Railway Company* (1861) ER 142; 10 CB (NS) 287 (refd)

*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, HL (refd)

*Bonham-Carter v Hyde Park Hotel* [1948] WN 89 (refd)

*Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16, HC (folld)

*Burgess v Stafford Hotel Ltd* [1990] 1 WLR 1215, CA (refd)

*Burgoine v Taylor* (1878) 9 Ch D 1 (refd)

*Burns v Kondel* [1971] 1 Lloyd's Rep 554 (distd)

*Cassell & Co Ltd v Broome & Anor* [1972] AC 1027, HL (refd)

*Cheak Yoke Thong v PP* [1984] 1 MLJ 311, HC (refd)

*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352, HC (not folld)

*Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377, HC (refd)

*Cockle v Joyce* (1877–1878) 7 Ch D 56 (refd)

*Cutler & Anor v MacPhail* [1962] 2 QB 292, QBD (refd)

*Delcont (M) Sdn Bhd v Motor Sport International Ltd (servant or agents at Federal Territory Labuan) & Ors* [1996] 1 CLJ 450, HC (refd)

*Duke of Bedford v Ellis & Ors* [1901] AC 1, HL (refd)

*'Edison', The* (1933) 45 Ll L Rep 117 (refd)

*Evans v Bartlam* [1937] AC 473, HL (refd)

*Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129, FC (refd)

*Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

*Haji Yahia bin Ismail v Bukah binti Mayah Pakeh, Paylak binti Saydi* [1933] 7 FMSLR 86, SC (refd)

A *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, CA (refd)
*Hock Seng Construction Sdn Bhd & Anor v Yeoh Poh Owi & Anor* [2001] 4 CLJ 1 (refd)
*Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427,
B HC (refd)
*Kingdon v Kirk* (1888) 37 Ch D 141 (refd)
*Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305, FC (folld)
*Leong Hong Khie v PP; Tan Gong Wai v PP* [1986] 2 MLJ 206, FC (refd)
C *Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344, CA (refd)
*Liew Geok Lan (f) v John Loh* [1993] 3 CLJ 158, HC (refd)
*Maleb bin Su v PP; Cheak Yoke Thong v PP* [1984] 1 MLJ 311, HC (refd)
*Markt & Co Ltd v Knight Steamship Co Ltd; Sale & Frazar v Knight Steamship*
D *Co Ltd* [1910] 2 KB 1021, CA (refd)
*Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7, PC (refd)
*Mohd Yusof Mohamad v Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866, HC (folld)
E *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267 (refd)
*Oh Jin Ghee & Ors v Abdul Hameed & Ors v Cheng Chiew Chin* [1998] 2 SLR 615, HC (refd)
*Packer v Denny* [1986] CA Transcript 310 (refd)
F *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624, HC (refd)
*Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, HC (dist)
*Redditch Benefit Building Society v Roberts* [1940] 1 Ch 415; [1940] 1 All ER
G 342, CA (refd)
*Robinson v Harman* (1848) ER 154; 1 Ex 850 (refd)
*Rookes v Barnard & Ors* [1964] AC 1129, HL (refd)
*Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301, PC (refd)
*Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79,
H HC (refd)
*Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372, CA (folld)
*Sri Jaya Transport Co Ltd v Fernandez* [1970] 1 MLJ 87, FC (refd)
*Stone v Smith* (1887) 35 Ch D 188 (refd)
*Sunley (B) and Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740, CA (refd)
I *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673, CA (refd)
*Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1991] 4 CLJ (Rep) 56, HC (refd)
*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, FC (dist)

*Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332, HC (refd)
*Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, HC (refd)
*Watt or Thomas v Thomas* [1947] AC 484, HL (refd)
*Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 1 MLJ 136, FC (refd)
*Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor* [1991] 3 MLJ 160, SC (refd)
*Yogananthy a/l AS Thambaiya lwn Idris bin Osman* [2006] 2 MLJ 101; [2006] 1 CLJ 430, CA (dist)
*Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (refd)

**Legislation referred to**
Contracts Act 1950 ss 74, 75
Courts of Judicature Act 1964 ss 3, 67, 67(1), 68, 68(1)(a), (2)
Criminal Procedure Code s 307(1)
Evidence Act 1950 ss 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73A
Federal Court (Civil Appeals) (Transitional) Rules 1963 r 13
Rules of the High Court 1980 O 15 r 12, O 35 rr 1, 1(2), 2, 2(1), (2), 6

**Appeal from**: Civil Suit No 22–85 of 2002 (High Court, Kota Bharu).

*Cecil Abraham (Sunil Abraham, Teo Poh Oon, Tunku Alina Alias and Farah Shuhadah with him) (Wong Lu Peen & Tunku Alina) for the appellants.*
*Yusfarizal Yusoff (Wan Rohimi Wan Daud, Muhd Azmi Talib and Asmadi Abu Bakar with him) (Wan Rohimi & Asmadi) for the respondents.*

**James Foong FCJ (delivering majority judgment):**

INTRODUCTION

**[1]** The facts of this case are rather straight forward. On the date fixed for hearing, which was on 13 January 2008, neither the defendants nor their counsel turned up in court. The High Court judge after giving indulgence of up to 10.30am decided to proceed with the hearing of the case in the absence of the defendants and/or their counsel. Three witnesses for the plaintiffs took the stand and tendered evidence supporting the plaintiffs' claim. After deliberation, the High Court decided in favour of the plaintiffs and awarded them a sum of RM7.1m as general damages, 10% of RM7.1m as aggravated damages, interest at 8%pa on RM7,810,000 from date of filing the writ to date of realisation and costs, all to be paid by the first and third defendants.

**[2]** The defendants' solicitors became aware of this on the evening of the judgment through a television news broadcast. They immediately applied,

the next day, to set-aside the judgment under O 35 r 1 of the Rules of the High Court 1980 ('RHC'). This application was heard and dismissed by the High Court on 28 January 2008. On the very same day, the defendants filed a notice of appeal against the decision of the High Court handed down on 13 January 2008 (Appeal No D-01–21 of 2008) and another against the decision of the learned judge in refusing to set aside the default judgment ie the decision handed down on 28 January 2008 (Appeal No D-01–22 of 2008).

**[3]** The defendants applied to consolidate these two appeals but was rejected by this court which ordered these two appeals be heard one after the other. Accordingly, we heard Appeal No D-01–22 of 2008 first.

PRELIMINARY OBJECTION

**[4]** Before we dwell into the substantive appeal, we have to dispose of a preliminary objection raised by the plaintiffs in encl 15A. In this application, the plaintiffs requested us to strike out Appeal No D-01–21 of 2008 on the ground that the defendants had elected to appeal against the decision on the refusal of the High Court to set aside the default judgment. In short, they are contending that since the defendants have filed an appeal against the decision to set aside the default judgment, the defendants are estopped from pursuing with their appeal against the decision of the High Court for entering judgment against them.

**[5]** In support of this proposition, the plaintiffs' counsel cited to us a number of authorities. We need not deal with them all since they relate to the same principle except to highlight one case *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors and another appeal* [2007] 1 MLJ 225; [2007] 1 CLJ 1 which says (at p 230 of MLJ):

> If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

**[6]** The defendants on the other hand insisted that they have the right to pursue both appeals. Their Appeal No D-01–22 of 2008 arose out of their application made under O 35 r 2 of the RHC which says:

(1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.

(2) An application under this rule must be made within 7 days after the trial.

**[7]** After the High Court has refused to set aside the judgment in default made pursuant to O 35 r 2 of the RHC, according to the defendants this order is appealable to the Court of Appeal by virtue of s 67 of the Courts of Judicature Act 1964 which provides:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

**[8]** Similarly, in respect of the default judgment made on 13 January 2008, it is again appealable to the Court of Appeal under this same provision — s 67(1) of the Courts of Judicature Act 1964.

**[9]** The proposition of a party who has elected to pursue with one of the two exclusive alternatives is estopped from retreating from the position he has adopted by election is based on a much cited passage in the authoritative text by Spencer, Brown and Turner on *The Law Relating to Estoppel by Representation* which was reproduced in *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors and another appeal* as well as the Privy Council case of *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7, which states:

> The last of the four fields in which the doctrine under discussion may be observed in operation, and, perhaps, the most important and interesting of them all, because yielding the greatest variety of illustrative examples, is the conduct of litigation, in the course of which it very frequently happens that a party litigant is confronted with the necessity of immediately making a definite choice between two possible courses of action which are mutually exclusive. Whenever this occurs, the general rule of estoppel by election comes into play: that is to say, if by words, or (as is almost invariably the case) by conduct or inaction, he represents to the other party litigant his intention to adopt one of the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he otherwise would have abandoned or modified, or (as the case may be) to change tactics from which he otherwise would never have deviated, the first party is estopped, as against his antagonist, from resorting afterwards to the course or attitude which, of his free choice, he has waived or discarded.

**[10]** One would observe from the above that for this principle of estoppel to apply there must first be an election made by one party and responded by

A the other who was encouraged by this election to adopt or persevere a line of conduct which he otherwise would have abandoned or modified or he has changed his tactics which he would not have adopted if not for the election. In short, there must be a positive act of election corresponded by a reaction from the other side to the act. But from the facts as disclosed in our instant B case, we found no evidence that the defendants had made any election in the first place. They have proceeded with the two appeals simultaneously. And neither did we find any evidence that the plaintiffs were encouraged by any election made by the defendants to alter their conduct of this case. The plaintiffs in fact were prepared to take on the defendants in both the appeals.

C

**[11]** Learned counsel for the plaintiffs however brought to our attention that there is the Court of Appeal decision in *Yogananthy a/l AS Thambaiya lwn Idris bin Osman* [2006] 2 MLJ 101; [2006] 1 CLJ 430 which ruled otherwise and the facts are on all fours as the present case. There the Court D of Appeal said:

> Memandangkan permohonan perayu untuk menghidupkan semula tuntutan dan mengenepikan penghakiman tersebut berikutan A 35 kk 1 dan 2 KMT yang telah digunapakainya, rayuan oleh perayu disini (yang cacat) terhadap penghakiman E tersebut adalah tidak bertempat, salah tanggap, salah faham dan merupakan satu penyalahgunaan proses mahkamah sebab penghakiman tersebut tidak boleh dirayu kerana ia tertakluk kepada A 35 kk 1 dan 2 KMT, sebab beliau dan peguamnya tidak hadir di mahkamah semasa perbicaraan kes tersebut yang telah ditetapkan pada 16 Oktober 2000.

F Translated into English:

> In view of the appellant's applications for reinstatement and to set aside the judgment under O 35 r 1 and 2 of the RHC, this appeal (which is defective) in respect of the said judgment is the wrong presumption, misconceived and an abuse G of process because the said judgment cannot be appealed upon since it is based on O 35 rr 1 and 2 of the RHC and also because they and their counsel did not appear in court at the day of trial which was fixed on 16 October 2000.

**[12]** Before we proceed to analyse this judgment, let us examine the facts H in *Yogananthy a/l AS Thambaiya v Idris Osman*. On 16 October 2000, the High Court has dismissed the plaintiff's claim on the failure of the plaintiff and/or his counsel to turn up in court for the hearing which was fixed for 16–17 October 2000. The High Court then proceeded to hear the defendant's counterclaim. Evidence from the defendants' two witnesses was I adduced to support the counterclaim. At the end of the trial, the plaintiff's claim was struck out and judgment entered for the defendant's counterclaim. On 17 October 2000, the plaintiff filed a notice under O 35 rr 1 and 2 of the RHC to set aside the order given on 16 October 2000. Then on 20 October 2000, the plaintiff applied to stay the execution on the default

judgment. And on 14 November 2000, the plaintiff filed an appeal against the default judgment given on the 16 October 2000. Thus, before the Court of Appeal there were three applications:

(i) the plaintiff's application to file appeal record out of time;

(ii) the plaintiff's application to stay execution (obviously the High Court must have refused the plaintiff's application for stay); and

(iii) the defendant's application for an order that the plaintiff's appeal against the order given on 16 October 2000 be struck out as it abused the court's process.

**[13]** In respect of the last application, the Court of Appeal has this to say:

> Perlu dinyatakan di sini sekali lagi bahawa asas permohonan responden di lampiran 18(a) ialah bahawa rayuan yang dibawa oleh perayu adalah merupakan satu penyalahgunaan proses mahkamah kerana perayu telahpun membuat permohonan di Mahkamah Tinggi mengikut A 35 kk 1 dan 2 Kaedah-Kaedah Mahkamah Tinggi 1980, memandangkan beliau dan peguamnya tidak menghadiri mahkamah pada 5 Disember 2000 terhadap keputusan tersebut yang telah diberikan pada 16 Oktober 2000 telah difailkan di luar masa seperti yang ditetapkan oleh k 12 Kaedah-Kaedah Mahkamah Rayuan 1994 ... Notis rayuan perayu sepatutnya difailkan dalam masa satu bulan dari 16 Oktober 2000, iaitu sebelum 15 November 2000. Oleh kerana ianya difailkan selepas masa yang ditetapkan untuk rayuan, iaitu pada 5 Disember 2000, adalah jelas bahawa rayuan tersebut telah tidak dibawa secara teratur ke hadapan mahkamah ini.

Translated into English:

> To repeat, the basis for the respondents' application in encl 18(a) is that the appeal by appellant is an abuse of process of the Court in that appellant has already filed an application in the High Court under O 35 rr 1 and 2 of the RHC due to their absence as well as their counsel in court on 16 October 2000. The notice of appeal which was filed by the appellant on 5 December 2000 was against this judgment given on 16 October 2000 is out of time by virtue of r 12 of the Rules of the Court of Appeal 1994 ...
>
> This notice of appeal ought to be filed in one month from 16 October 2000 which is before 15 November 2000. Because it was filed out of time on 5 December 2000, this appeal is irregular before this court.

**[14]** It was based on this ground ie that the appeal filed against the case proper was out of time that the passage cited by the defendants' counsel above was made. The Court of Appeal in *Yogananthy a/l AS Thambaiya v Idris Osman*, in our view, did not lay down any general principle that once an appeal against an order of refusal to set aside made under O 35 rr 1 and 2 of the RHC was filed an appeal against the default judgment cannot be maintained. It was on the ground that the appeal against the default

judgment was defective that the Court of Appeal dismissed the appeal; not for the filing of a concurrent application for reinstatement.

**[15]** Further, we would like to point out that in *Yogananthy a/l AS Thambaiya v Idris Osman* the appeal against the decision for the refusal to set aside the default judgment was filed much earlier than the appeal against the default judgment. This may have created an impression that an election has been made by the appellant resulting in the appellant being estopped. But in our instant case, both appeals were filed simultaneously creating no notion to the plaintiffs that an election was made by the defendants in not pursuing with one course of action in preference to another exclusive alternative.

**[16]** To conclude on this issue, we would like to remind that this principle of estoppel, being equitable in nature should only be used where justice dictates and should only be applied 'according to the facts and circumstances of each particular case and its operation depends much upon the conduct of the parties' — see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305. And, based on the facts as stated above, we found no merit in this preliminary objection and dismissed it accordingly.

APPEAL PROPER AND PRINCIPLES TO BE APPLIED

**[17]** We shall now return to the appeal proper. We start by stating that in an application to set aside a default judgment due to non appearance of a party, a distinction must be made between one where such judgment was obtained without a trial having proceeded and one which did. In the former, which covers default due to a failure to file an appearance after the writ was served or default of defence, the principle in *Evans v Bartlam* [1937] AC 473 applies. It is basically:

> unless and until the court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive powers where that has only been obtained by a failure to follow any rules of procedure.

And in *Burnes v Kondel* [1971] 1 Lloyd's Rep 554 at p 444, Lord Denning MR expanded to say that a 'defence on the merits' means a defence which discloses an arguable and triable issue. In short, the court, as a general rule, will not set aside such default judgment unless the defendant can establish a defence on merit. This seems to be the predominant feature against the explanation for the default or for any delay in applying to set it aside.

**[18]** But when a judgment is entered after a trial has proceeded a different set of rules applies. In the English Court of Appeal case of *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 372, the major factors to be considered to set aside such default judgment differ from that in *Evans v Bartlam* in the

order of priority and prominence. The reason for the absence of the party at the trial has become the 'predominant consideration' over that of a defence on merit. This can be observed from the judgment of Leggatt LJ when he said:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

(2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.

(3) Where the setting aside would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so.

(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) Delaying in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

**[19]** Our courts have adopted this principle in *Abdul Rafar bin Maimunni & Anor v HM Latiff bin KM Haneefa* [2008] 1 LNS 157 and *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v Best Fruits Sdn Bhd* [2006] 1 LNS 267. We are of the view that this represents the current state of the law when dealing with an application to set aside a default judgment where a trial has proceeded and we shall apply this to the facts of this case.

FACTOR: REASONS FOR THE ABSENCE

**[20]** As reason for the defendants' absence has become the predominant

consideration, we shall first examine the excuse rendered by the defendants for failing to turn up in court for the hearing. According to the defendants' counsel's submission the excuse was:

> The solicitor who had conduct of the matter, namely one Munir Shah bin Mohd Husan, had resigned from the firm of Wong Lu Peen & Tunku Alina (the defendants' solicitors). However, prior to the date of his resignation from the firm in December 2008, the date of the hearing was not entered into the firm's diary by the said lawyer. As such, no solicitor for the appellants was present at the Kota Bharu High Court on 13 January 2008 when the above matter was fixed for trial.

**[21]** This excuse offered by the defendants seem to lay the blame on an employee engaged by the defendants' solicitors who failed to enter into the diary the hearing date. But an employer is responsible for the action of his employee and so is the conduct of the defendants' solicitors binding the defendants. Undoubtedly, such callous act of the defendants' solicitors speaks very poorly of them. And such excuse has for the last decade become a common feature for an applicant to convince the court into granting him a retrial. But from authorities (*Mohd Yusof Mohamad v Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866; *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111; [1990] 1 CLJ (Rep) 606) such excuse has not been tolerated. This has in fact irked the court to remark in *Lim Soh Wah & Anor v Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344:

> One of the fundamental duties of a solicitor is to diarise his cases, keep his client informed of the diarised dates and prepare the case with his client. The present instance is a case where there was a failure to discharge this rather fundamental obligation. As a result the clients suffered.

**[22]** We would further like to add that if the proprietors of the defendants' solicitors' firm were indifferent or had little interest in managing their firm properly by failing to devise a system to monitor and check on whether the duties or instructions given to its employee were carried out then this would amount to a deliberate act or defiance of a court order if such order were given to such employee and not complied with. This is no longer a mistake or an accident especially in this modern world of technology, where systems for monitoring compliance of duties imposed on staff and other members of an organisation are readily available in the market and have reached a sophisticated level. Poor management and the lack of care taken to record a hearing date can no longer be tolerated.

**[23]** Aside from the above, the plaintiffs have also adduced evidence, which is not rebutted by the defendants, that they have sent by letter of reminder to the defendants' lawyer of the hearing date. Though Encik Munir may have

been careless in not entering this date into the diary such notification would have alerted other members in the defendants' solicitors' firm of the forthcoming event. And if they chose to ignore it then their reason for the absence of the defendants is inexcusable.

**[24]** We would like also to mention that against the present judicial policy of strict adherence to hearing dates once set this excuse of the defendants attracts minimum tolerance from the court. Waste of judicial time and resources undermines the efforts of the judiciary's to eradicate the backlog of cases faced by the courts.

FACTOR: REAL PROSPECT OF SUCCESS

*A Release of a joint tortfeasor*

**[25]** We shall now move to the next factor for consideration: whether the defendants have any real prospect of success in their defence if the default judgment is set aside. The defendants' counsel has submitted that the High Court has erred in five areas of the law and this is sufficient to overturn the decision given on 13 January 2008. The first relates to the plaintiffs' cause of action of conspiracy by the first, second and third defendants to defraud the plaintiffs. According to him, this cause of action cannot be maintained against the first and third defendants without the second defendant who passed away before the trial and no substitution of him as party to the action was made by the plaintiff. This is based on the proposition that if one joint torfeassor is dead or released by the plaintiff the claim against the remaining tortfeasors is extinguished. For support of this, a passage from the judgment of Salmon J in *Cutler & Anor v MacPhail* [1962] 2 QB 292 was cited:

> The points raised on release are extremely interesting and by no means easy. The principle is quite plain, that if there is a release of one joint torfeasor, the cause of action against all the other joint tortfeasors is extinguished; on the other hand, if there is merely an agreement not to sue one of several joint tortfeasors, the cause of action does not die and the other tortfeasors can properly be sued.

**[26]** In order to fully appreciate this argument, it is necessary for us to disclose briefly the plaintiffs' claim. The plaintiffs are 354 FELDA settlers in a particular FELDA scheme in the State of Kelantan. The first defendant is a statutory body operating such scheme throughout the country. The second defendant was, the manager of the first defendant in this particular scheme. The third defendant operates a palm oil mill. By an agreement between the plaintiffs and the first defendant, all oil palm fruits harvested from the plaintiffs' scheme were sold to the third defendant to be processed and profits from this sale would be divided between the plaintiffs and the first defendant.

In the year 2001, the plaintiffs discovered that the first, second and third defendants either jointly or severally had deceived and/or conspired to deceive the plaintiffs in the sale of these oil palm fruits to the third defendant resulting in a loss to the plaintiffs; thus this action by the plaintiffs. The defendants of course denied this claim. Sometime in the year 2006, before the trial commenced, the plaintiffs heard a rumour that the second defendant has passed away. This prompted the plaintiffs' solicitors to write a letter to the defendants' solicitors for confirmation. In it the plaintiffs also expressed their willingness to withdraw their claim against the second defendant if this was true. There was no response from the defendants or their solicitors. As the case progressed, the defendants' solicitors made no reference at all to the death of the second defendant. Eventually, when the High Court delivered its decision on 13 January 2008, the award handed down in favour of the plaintiffs was only against the first and third defendants.

**[27]** Rebutting the need for a substitution of the deceased second defendant in this proceedings, the plaintiffs' counsel highlighted to us two passages from the *Malaysian Court Practice, High Court* (2007 Ed):

> If a sole defendant dies and the cause of action is one that survives, the plaintiff may obtain an order to continue the proceedings as against the executor or administrator of the deceased defendant or such executor or administrator may himself apply to be substituted or added as defendant, but unless and until such executor or administrator is added, the action cannot continue: *Chockalingam Chetty v Amin* [1933–1934] FMSLR 130; *Oh Jin Ghee & ors v Abdul Hameed & Ors v Cheng Chiew Chin* [1998] 2 SLR 615 (HC).
>
> Where one of two or more defendants dies, if the defendants are jointly liable, the liability continues against the survivors and there is no strict necessity to add the personal representative of the deceased defendant. If all dies, the proceedings should be continued against the representative of the last surviving defendant, if the defendants are jointly and severally liable the action may be continued against the survivors or against the representative of the decease defendant and the survivors.

**[28]** To fortify this proposition, plaintiffs' counsel cited to us the judgment of the High Court in *Tajjul Ariffin bin Mustafa* which says that procedural rule does not negate the rule of substantive law and that each joint tortfeasor is liable for the entire damage resulting from their tortious act.

**[29]** Undoubtedly, the causes of action mounted by the plaintiffs in this case are tortious in nature. They are fraud and conspiracy to defraud. But in the case of fraud, the plaintiffs have claimed against the defendants jointly and/or severally. Thus each of the defendants is individually liable to the

plaintiffs. In such situation there can be no question of the first and third defendants being released by the plaintiff on account of the death of the second defendant.

**[30]** In the cause of action for conspiracy, we agree that all defendants are joint tortfeasors. But when one of them dies, the law, as it now stands, says that an action against the surviving tortfeasors continues to subsist without the strict necessity to substitute the deceased defendant. In short, the action continues against the remaining tortfeasors. Going by this proposition, the first and third defendants remain liable to the plaintiffs; they have not been discharged.

**[31]** Concerning whether there was a release given by the plaintiffs to the deceased second defendant, we are of the view that though such desire was expressed it was not an act of withdrawal. Besides, when the defendants' solicitors failed to respond to the plaintiffs' request for confirmation on the death of the second defendant such intention to release naturally expires. We have also scrutinised the notes of evidence of the High Court and found no record that the plaintiffs have requested to withdraw their claim against the second defendant. It was the High Court's own discretion to refuse awarding any damages against the second defendant. Such order of the court cannot be considered as an act of the plaintiffs. For these reasons we hold the view that this contention of the defendants has no merit.

*Failure to prove damages suffered*

**[32]** The next point raised by the defendants is that the High Court has applied the wrong principle when awarding general damages and such award is unsupported by documentary evidence.

**[33]** Before we consider these allegations we reproduce a translation of what the High Court ruled.

> PW3 then gave evidence on the calculations of the losses sustained by the plaintiffs due to the deception and conspiracy by the defendants. According to PW3 all 354 plaintiffs sustained losses of RM7146,291 in total. The basis of the calculation is the difference in the price of fruit per tonne which ought to have been paid to the settler multiplied by the total number of tonnes of fruit actually sold to the Felda factory. The formula is the actual price of palm fruit per tonne according to the quality of the fruit less (–) the price of palm fruit per tonne according to the grade valuation by the Felda factory multiplied (x) by the total volume.
>
> The grade of the palm fruit valued by the Felda factory was in the region of KPG 17.5%. The price per tonne of palm fruit was RM250. KPG1% is equivalent to RM14.28 (250/17). The grade valued by the Felda factory was KPG 17.5%. The KPG ought to have been graded as 21%. The difference in the KPG which ought

to have been paid to the plaintiffs is 21% – 17.5% = 3.5%. Total loss for the year 1997 is 56.27 x 21,166.67 — RM1,191,048.52 (56.27 is the price difference. 21,166.67 is the volume in tones). The loss incurred by the plaintiffs for the years 1997–2002 is RM1,191,048.52 x 6 years = RM7,146,291.12.

The court finds that the sum of the calculations done by PW 3 simple, clear and correct.

**[34]** According to the defendants, the correct principle applicable for consideration of this matter is stated in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 359. And the statutory provision governing this is ss 74 and 75 of the Contracts Act 1950.

**[35]** We regret to inform that two out of the three cases and the statutory provisions cited apply only to damages for breach of contract. The case before us is one of tort. The other case (*Cheng Hang Guan & Ors v Perumaham Farlim (Penang) Sdn Bhd*) involves a cause of action for trespass and nuisance which is of very little assistance to us.

**[36]** It is our view that for a claim based on fraud and conspiracy to defraud, the plaintiffs should be entitled to the loss suffered as the result of the deprivation of their income or profit caused by the wrong committed by the defendants after taking into account the foreseeability factor — see para 1138 *Halsbury's Laws of England* (4th Ed), Vol 12. Here the plaintiffs' third witness has given creditable and uncontradicted evidence on how the amount of losses was arrived at and this has been accepted by the High Court. Though each plaintiff was not called to testify on their respective loss, we see no reason for this requirement since in this FELDA scheme all the plaintiffs have agreed to sell their crops to the third defendant and the profits derived therefrom shared collectively by them with the first defendant.

**[37]** The defendants also complained of the absence of documentary evidence to support a finding of actual loss suffered by the plaintiffs. We, however, fail to appreciate this in the face of the adequate and comprehensive oral testimony by PW3 who has systematically and methodically worked out the amount of losses. For this we are not inclined to disturb the finding of the trial judge who has applied the correct principles in law in coming to his finding which is substantiated by cogent evidence.

*Exemplary damages*

**[38]** The amount of exemplary damages awarded by the High Court based

on 10% of RM7,146,291 is considered excessive by the defendants and according to them this was made against established principles. Basically, the law sets down that this category of damages, if awarded, should be moderate and the resources of the parties must be taken into account. Other factors to be considered are the quantum of compensatory award as well as the conduct of the parties right down to the time of the judgment. The gravity of the wrong is also another item to be taken into account. These are spelled out in *Cheng Hang Guan & Ors v Perumaham Farlim (Penang) Sdn Bhd*.

**[39]** On the conduct of the party we would like to highlight that the role of the first defendant, as a statutory body, was to assist the plaintiffs in raising their standard of living. Instead, we have here a situation of the first defendant cheating the plaintiffs. In a position of authority over the plaintiffs in the allotment of land in the said scheme the first defendant had, after this suit was filed, threatened to evict the plaintiffs from the scheme for pursuing this action. Such intimidation weighs against the first defendant. The third defendant is no better since they are associated with or is part of the first defendant. Given these circumstances and having taken into account all other relevant factors into consideration, we are of the view that the trial judge's award of this amount is justified.

*Standard of proof*

**[40]** The next contention of the defendants is that the High Court has applied the wrong standard of proof. In a cause of action for fraud and conspiracy to defraud, according to the defendants, the standard of proof is beyond reasonable doubt but in this instance the High Court has applied the balance of probabilities.

**[41]** Having perused the High Court's judgment given on 13 January 2008, we find this allegation of the defendants incorrect. What the High Court said was this:

> Mahkamah menggunakan beban bukti imbangan kebarangkalian. Namun begitu jika mahkamah menggunakan beban bukti melampaui keraguan yang munasabah sekalipun, mahkamah tetap akan membuat keputusan yang sama. Keputusan kes Mahkamah Persekutuan *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 membenarkan sedemikian. Di samping itu suka ditekankan di sini bahawa menurut amalan siasatan pihak polis, mereka tidak akan meneruskan siasatan fraud yang melibatkan kes sivil begini.

Translated:

> This court has used the balance of probabilities as the standard of proof. Even though the court uses standard of proof of beyond reasonable doubt it would still arrive at the same decision. The Federal Court authority of *Yong Tim v Hoo Kok*

A *Chong & Anor* [2005] 3 CLJ 229, allows this. Besides it must be stressed that following police investigation into this case, the police were of the opinion that this is a civil case.

B **[42]** In *Yong Tim v Hoo Kok Chong* the Federal Court laid down the standard of proof for fraud in civil proceedings as beyond reasonable doubt. However this case made no reference to an earlier authority by the same court in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 where the headnotes C reads:

> Whether the allegation of fraud in civil proceedings concerns criminal fraud such as conspiring to defraud, misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt and not on the balance of probabilities. An allegation of criminal D fraud in civil or criminal proceedings cannot be merely based on suspicion. However where the allegation of fraud is entirely founded on civil fraud and not criminal conduct or offence, a balance of probability is applicable.

E **[43]** Faced with this, we understand the predicament of the High Court on the standard of proof to be applied. To resolve this, the High Court declared that even if proof beyond reasonable doubt is applied, its decision would still be the same. This is a clear indication that the High Court has considered and applied the higher standard of proof in coming to a conclusion that the F defendants are liable to the plaintiffs.

*Admission of documents not previously agreed upon*

G **[44]** The defendants claimed that the High Court had admitted oral and documentary evidence without regard to whether they are admissible. In support of this, the case of *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 was cited where Shankar J declared that documentary evidence tendered must be proved. Though the defence have not identified specifically to us the H impugned documents and oral evidence they claimed were not proved, the submission of the defendants tends to point towards the plaintiffs' 'ikatan document tambahan' (the bundle of additional documents). This bundle, according to the defendants was not previously agreed upon by them to be admitted without proof.

I **[45]** We find this assertion unsubstantiated. These documents were admitted by the court when they were tendered by the plaintiffs during the trial. Once admitted they are considered evidence. As for oral evidence, we find them properly admitted by the court.

FACTOR: NO DELAY IN APPLYING TO SET ASIDE

**[46]** We do not deny the fact that the defendants had taken prompt and immediate action to file this application to set aside the judgment in default. This, however, is merely one of the factors to be considered. But in the light of the very weak excuse given for the absence of the defendants in court on the day set for trial and having no real prospect of success in their defence, this sole act of the defendants in seeking prompt redress pales in significance. Further, it is a public policy that there should be finality in an action rather than having to engage the court to conduct two trials instead of one.

CONCLUSION

**[47]** For reasons above, by way of a majority, this appeal should be dismissed with costs. Deposit for this appeal to the plaintiffs towards account of taxed costs.

**Abdul Malik Ishak JCA (delivering dissenting judgment):**

THE FACTS

**[48]** The appellants were the defendants in the High Court Civil Suit No 22–85 of 2002.

**[49]** While the respondents were the plaintiffs in the High Court Civil Suit No 22–85 of 2002. Altogether, there were a total of 354 plaintiffs in this suit. And the suit was not a representative action. I have more to say of this later.

**[50]** The Civil Suit No 22–85 of 2002 was fixed for hearing before the learned judge of the High Court for two days, namely, on 13 January 2008 and 14 January 2008.

**[51]** The solicitor for the appellants defendants who had conduct of the matter at the High Court was one Munir Shah bin Mohd Husan ('Munir'). But, unfortunately, Munir had not only resigned from the law firm of Messrs Wong Lu Peen & Tunku Alina on 19 December 2007 but he had also failed to enter the hearing dates on the master diary with the consequent result that neither the appellants defendants nor their counsel turned up on the date of hearing before the learned judge of the High Court.

**[52]** On 13 January 2008, the hearing before the learned judge of the High Court proceeded in the absence of the appellants defendants and their solicitors. At the end of the hearing on 13 January 2008, the learned judge

of the High Court gave judgment in favour of the respondents plaintiffs and awarded general damages in the sum of RM7.1m, and aggravated damages calculated at 10% of RM7.1m amounting to RM710,000 together with interest at 8%pa on RM7,810,000 from the date of filing the writ to the date of realisation and costs which cumulatively had to be paid by the first appellant defendant and the third appellant defendant ('judgment').

**[53]** The appellants defendants' solicitors only became aware of the said judgment on the very night of 13 January 2008 when the matter was broadcasted nationwide on national television.

**[54]** Acting swiftly, the appellants defendants' solicitors immediately filed on 14 January 2008 an application to set-aside the judgment in default of appearance pursuant to O 35 r 1(2) of the RHC on a certificate of urgency.

**[55]** On 20 January 2008, the learned judge of the High Court heard the application to set aside the judgment in default of appearance.

**[56]** On 28 January 2008, the learned judge of the High Court dismissed the appellants defendants' application to set aside the judgment in default of failing to appear at the trial.

**[57]** On the very same day — and that would be on 28 January 2008, the appellants defendants' filed the following documents at the High Court registry:

(a) a notice of appeal against the whole decision of the learned judge of the High Court vide Civil Appeal No D-01–22 of 2008 that was delivered on 13 January 2008 ('first appeal'); and

(b) a notice of appeal against the whole decision of the learned judge of the High Court in dismissing the appellants defendants' application to set aside the judgment in default of appearance vide Civil Appeal No D-01–22 of 2008 that was delivered on 28 January 2008 ('second appeal').

**[58]** On 22 February 2008, the appellants defendants filed an application to consolidate both these two appeals — the first appeal and the second appeal, but another panel of this court dismissed the appellants defendants' consolidation application and directed that both the appeals be heard one after another.

THE RESPONDENTS PLAINTIFFS' APPLICATION IN ENCL 15a

**[59]** By this encl 15a, the respondents plaintiffs sought to strike out the

first appeal by contending that the appellants defendants had made an election to proceed with the second appeal and was thus estopped from pursuing with the first appeal.

**[60]** I find myself in complete agreement with the judgment of my learned brother James Foong FCJ in his excellent treatment and approach to encl 15a. His Lordship has admirably examined the law in the context of the facts of the present case and we unanimously dismissed encl 15a forthwith. As a matter of law there are no principles of law that require the appellants defendants to be put to an election of their rights because both these two appeals are in respect of different matters, issues and questions of law.

**[61]** The burden falls on the respondents plaintiffs to show that the first appeal should be struck out by showing that either the grounds of the first appeal are not capable of being argued or that the first appeal are frivolous, vexatious or an abuse of process. Only in 'clear and obvious cases' that this panel will strike out the first appeal. In the words of Glidewell LJ in the case of *Burgess v Stafford Hotel Ltd* [1990] 1 WLR 1215 at p 1222:

> The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases.

**[62]** The decisions of the learned judge of the High Court on 13 January 2008 and on 28 January 2008 are appealable. Section 3 of the Courts of Judicature Act 1964 defines the word 'decision' to mean 'judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. It cannot be denied that the decision of the learned judge of the High Court that was handed down on 13 January 2008 finally disposed of the appellants defendants' rights before the High Court and that would entitle the appellants defendants to file in the notice of appeal which they did.

**[63]** Section 67(1) of the Courts of Judicature Act 1964 gives jurisdiction to this panel to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provision of this sub-section or any other written law regulating the terms and conditions upon which such appeals shall be brought.

**[64]** The decisions of the learned judge of the High Court on 13 January 2008 and on 28 January 2008 are not caught within the ambit of s 68 of the Courts of Judicature Act 1964 in that they are appealable matters which can be heard by this panel.

**[65]** In relation to the second appeal, I have this to say. It relates to the appellants defendants' application to set aside the judgment in default due to the absence of the appellants defendants and their solicitors and it is an interlocutory matter which finally disposed of the appellants defendants' rights before the High Court. So, the only remaining recourse for the appellants defendants would be to seek a review of the decision of the learned High Court judge by way of an appeal to the Court of Appeal by filing the required notice of appeal on 28 January 2008. That being the case, in my judgment, the requirements of s 3 of the Courts of Judicature Act 1964 read together with s 68 of the same Act have been complied with.

**[66]** Similar words like 'judgment, sentence, or order' that appear in s 307(1) of the Criminal Procedure Code also appear in s 3 of the Courts of Judicature Act 1964 and it was held to mean in the case of *Maleb bin Su v Public Prosecutor; Cheak Yoke Thong v Public Prosecutor* [1984] 1 MLJ 311 as a decision which would 'finally dispose of the rights of the accused persons' and this was approved by way of an obiter by the Supreme Court in the case of *Ang Gin Lee v Public Prosecutor* [1991] 1 MLJ 498.

**[67]** The marginal note to s 68 of the Courts of Judicature Act 1964 refers to 'non-appealable matters' and it prescribes what the matters are which may not be brought before the Court of Appeal. Section 68(1)(a) of the Courts of Judicature Act 1964 makes reference to the 'amount of the claim' and the 'value of the subject matter of the claim' which cannot be less than RM250,000 (see *Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor* [1991] 3 MLJ 160 (SC) which was judicially considered by the Federal Court in the case of *Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 1 MLJ 136). In my considered view, the correct approach to understand and apply s 68 of the Courts of Judicature Act 1964 is to read sub-s (1)(a) as the dominant provision because the real purpose or object of s 68(1)(a) of the said Act is to prevent cases involving less than RM250,000 to be brought to the Court of Appeal without leave (*Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor*). Here, the quantum was more than RM7.1m and it was certainly appealable without the need to obtain leave of the Court of Appeal.

**[68]** I must reiterate that, as a matter of law, the decisions of the learned High Court judge on 13 January 2008 and on 28 January 2008 are appealable. These two appeals are distinct and different from one another. The first appeal relates to the merits of the entire suit whilst the second appeal relates to the dismissal of the appellants defendants' application to set aside the judgment in default of appearance. I cannot help but make the following observations:

(a) in filing the first appeal and the second appeal there was no issue of

abuse of the process of the court nor have the appellants defendants waived or relinquished their rights to appeal to the Court of Appeal against both decisions of the learned High Court judge by way of separate appeals; and

(b) that this was not a plain case warranting a striking out of any of the appeals.

**[69]** The filing of encl 15a by the respondents plaintiffs were entirely misconceived and ought to be struck out in limine for the following reasons:

(i) on 7 March 2008, the respondents plaintiffs filed a notice of motion to strike out Civil Appeal No D-01–21 of 2008 in another appeal and that would be Civil Appeal No D-01–22 of 2008;

(ii) on 12 May 2008, the Court of Appeal dismissed the notice of motion to strike out Civil Appeal No D-01–21 of 2008 that was filed in Civil Appeal No D-01–22 of 2008;

(iii) the respondents plaintiffs' striking out application was clearly subject to the doctrine of res judicata and was tantamount to an abuse of process; and

(iv) the respondents plaintiffs' application to strike out was clearly a ploy to circumvent the determination of the Civil Appeal No D-01–21 of 2008 on its merits and that the proper procedure was for the respondents plaintiffs to oppose the appeal proper rather than filing an interlocutory application to strike out the notice of appeal.

**[70]** For all these reasons, encl 15a ought to be dismissed, and we so order accordingly.

THE APPEAL PROPER

**[71]** I begin by making reference to O 35 r 1(2) of the RHC which states as follows:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party.

**[72]** Now, when one party fails to appear, just like the facts which prompted the first appeal, the High Court may proceed with the trial in the absence of the party. But the party who appears before the High Court, just like the respondents plaintiffs, will have to prove their case on any issue which the respondents plaintiffs bear the burden of proof. In short, the respondents plaintiffs will have to prove their claim (*Liew Geok Lan (f) v John Loh* [1993]

A 3 CLJ 158 (HC); *Barker v Furlong* [1891] 2 Ch 172 at p 179; and *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79). And once the respondents plaintiffs have proved their case they are entitled to the reliefs which they claim and such other reliefs which are consistent with their claim (*Stone v Smith* (1887) 35 Ch D 188; and *Kingdon v Kirk* (1888)
B 37 Ch D 141).

**[73]** It must emphasised that the burden of proof lies on the respondents plaintiffs to prove their claim notwithstanding the absence of the appellants defendants or their counsel.

C

**[74]** It must be borne in mind that where judgment is given in the absence of either party, the absent party, like the appellants defendants here, may apply to set it aside under r 2(1) of O 35 of the RHC.

D

**[75]** I will now make reference to O 35 r 2 of the RHC which states as follows:

> Judgment, etc, given in absence of party may be set aside (Order 35 rule 2)
>
> E (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial.

F

**[76]** Here, there was promptitude on the part of the appellants defendants in filing an application to set aside the judgment in default of appearance pursuant to O 35 r 2(2) of the RHC.

G

**[77]** It is quite obvious that r 2 of O 35 of the RHC complements r 1(2) of O 35 of the RHC. It empowers the court, here it would be the High Court, on the application of the party in default, to set aside the judgment or grant an order on such terms.

H

**[78]** Of course, any judgment or order given in the absence of a party to the suit — here it would be the appellants defendants, may be set aside at the discretion of the High Court who will examine the reasons for the party's absence. According to the case of *Burgoine v Taylor* (1878) 9 Ch D 1 at p 4,
I where judgment was entered due to the solicitor's absence mainly because of the solicitor's negligence in failing to look at the correct hearing list, the judgment may be set aside. And when that happens, according to the case of *Cockle v Joyce* (1877–1878) 7 Ch D 56, the terms in setting aside the judgment are usually worded to show that the party in default to pay the costs

of the day which would include all costs thrown away by reason of the trial becoming abortive as well as the costs of the application to restore the case on the hearing list.

**[79]** And if this panel is satisfied that the party in default was prevented by sufficient cause from appearing when the suit was called for hearing on 13 January 2008 before the learned judge of the High Court and that the claim shows some merits and if justice can indeed be done by compensating the other side for any costs thrown away, this panel, with respect, is bound to set aside the judgment and order a new trial (*Buga Singh v Koh Bon Keo* [1967] 1 MLJ 16; *Haji Yahia bin Ismail v Bukah binti Mayah Pakeh, Paylak binti Saydi* [1933] 7 FMSLR 86 (SC); and *Redditch Benefit Building Society v Roberts* [1940] 1 Ch 415; [1940] 1 All ER 342 (CA)).

**[80]** Here, we are concerned with an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel. And because of this, different considerations apply as compared to an application to set aside a default judgment. The predominant consideration for this panel to consider was not whether there was a defence on the merits but rather the reason as to why the appellants defendants had absented themselves, and if the absence was deliberate and not due to accident or mistake, this court would be unlikely to allow a rehearing. There are other relevant considerations which include the prospects of success of the appellants defendants in a retrial, the delay in applying to set aside the judgment, the conduct of the appellants defendants, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.

**[81]** All these predominant considerations have been neatly set out in the judgment of Leggatt LJ, writing for the Court of Appeal, in *Shocked & Anor v Goldschmidt & Ors* [1998] 1 All ER 375. At p 381, this was what Leggatt LJ said:

> These authorities about setting aside judgment after a trial indicate that each case depends on its own facts and that the weight to be accorded to the relevant factors will alter accordingly. But from them I derive the following propositions or 'general indications' as Lord Wright might have called them. (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects

of success. (5) Delay in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

**[82]** Raja Azlan Shah J (as His Majesty then was) in *Buga Singh v Koh Bon Keo* dealt with a situation where on the date of the hearing both the appellant and his counsel were absent but the respondent and his counsel were present and, in such circumstances, the learned magistrate dismissed the appellant's case with costs. On appeal, this was what His Majesty said at p 16:

> To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown away, then a new trial ought to be ordered. In the present case counsel for the respondent sought to argue that the claim bears no merits as it contravenes the limitation law, that is, the IOU chit was executed in 1952 but action was brought in 1964. That may be so, but para 4 of the statement of claim avers that in 1963 three sums of money were paid on various dates by the respondent in respect of the alleged loan. Therefore, if that averment is substantiated, the appellant's claim may be well founded as time runs afresh from date of payment, ie from 1963. That is an issue to be tried and, in my judgment, contains some merits.
>
> It is not my intention to exegesise the law on this subject but I will merely refer to the case of *Hayman v Rowlands* [1957] 1 All ER 321 where Denning LJ had this to say:
>
> > I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits but, so long as he does so, the strength or weakness of it does not matter.
>
> In my view there are some merits in the claim, and justice can be done by compensating the respondent for any costs thrown away. I will allow this appeal and order a fresh trial. The appellant will have to bear all costs thrown away by the respondent.

**[83]** The law is settled. It is this. That although the court has an unfettered discretion to grant or refuse an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel, there must be some material on which this panel can exercise its discretion in favour of the

appellants defendants. The material considerations which this panel ought to consider in granting or refusing an application to set aside a judgment after a trial in the absence of the appellants defendants and their counsel are as follows:

(i) whether the absence of the appellants defendants and their counsel was deliberate or due to a mistake?

(ii) whether there are prospects of success and merits of the appellants defendants' defence at the retrial?

(iii) whether there was any delay in the application filed by the appellants defendants in setting aside the judgment after a trial?

(iv) whether there was any conduct on the part of the appellants defendants which would prejudice the respondents plaintiffs?

**[84]** I will now examine the material considerations in quick succession.

THE FIRST CONSIDERATION

**[85]** The learned judge of the High Court arrived at the conclusion favouring the respondents plaintiffs by relying on the following authorities:

(a) *Sri Jaya Transport Co Ltd v Fernandez* [1970] 1 MLJ 87 (FC);

(b) *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 (FC);

(c) *Yogananthy a/l AS Thambaiya lwn Idris bin Osman* [2006] 2 MLJ 101; [2006] 1 CLJ 430 (CA);

(d) *Delcont (M) Sdn Bhd v Motor Sport International Ltd (servant or agents at Federal Territory Labuan) & Ors* [1996] 1 CLJ 450 (HC); and

(e) *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111; [1990] 1 CLJ (Rep) 606 (HC).

**[86]** Upon perusal of these authorities, I must categorically say that not all the authorities relied upon dealt with an application to set aside a judgment pursuant to O 35 r 2 of the RHC. And the 'mistake' of the solicitors in these authorities together with the circumstances that led to such mistake differed greatly from the present appeal at hand. A short synopsis of these authorities will now be rendered.

**[87]** The case of *Sri Jaya Transport Co Ltd v Fernandez* concerned an application for special leave to appeal out of time under r 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 (LN 242/63). The Federal Court held that the appellants should have applied for leave under s 68(2) of

A the Courts of Judicature Act 1964 and since they have failed to do so and have not shown that there are special grounds for the court to exercise its discretion to grant them special leave to appeal out of time, the application must be dismissed.

B **[88]** The case of *Gan Hay Chong v Siow Kian Yuh & Anor* concerned the application of the appellant for extension of time to file the memorandum of appeal and to serve it on the respondents. In dismissing the appeal, the Federal Court held that the mistake of the appellant's solicitors in the circumstances of the case did not constitute a sufficient ground for granting C the extension of time. It must be emphasised that the mistake referred to by the Federal Court was entirely different from the mistake by the appellants defendants' solicitors in the present appeal before this court. Delivering the judgment of the Federal Court, this was what Chang Min Tat J, had to say at p 131:

D

> Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr Atma Singh's contention that he had read the E 14-day period in rule 2(5) of Order XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated 28 May 1973 from the solicitors for the respondents of the requirement in O 59 rr 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or F should have been disabused of his earlier mistake by this later advice.

**[89]** It is apparent that both *Sri Jaya Transport* and *Gan Hay Chong* cases are poles apart from the present appeal. These two cases do not relate to an G application to set aside a judgment after a trial in the absence of the absent parties and their counsel. Thus, different considerations would apply and the learned judge of the High Court had misdirected himself when he relied on these two cases.

H **[90]** I shall now say something about the case of *Yogananthy a/l AS Thambaiya lwn Idris bin Osman*. That was a case where the Court of Appeal considered, inter alia, the appellants' appeal against the decision of the High Court judge in dismissing the appellants' application to set aside the judgment. The Court of Appeal was satisfied, after perusal of the written I judgment of the High Court, that the trial judge's decision was correct in view of the conduct of the counsel for the appellants which was said to be contumelious and undeserving of the court's sympathy. By comparison, in the present appeal, the appellants defendants have filed the appeal expeditiously and without any delay or contumelious conduct.

**[91]** The plaintiff applied ex parte in *Delcont (M) Sdn Bhd* and obtained various injunctive orders against the defendants. The defendants applied for leave to enter conditional appearance and then filed a fresh application to set aside the issue and service of the writ. The registrar allowed the prayer and the plaintiff appealed. The appeal came up before the first High Court judge on 21 June 1995 and on that date only the plaintiff's counsel was present. The first High Court judge nonetheless heard the plaintiff and deferred judgment to 10 July 1995 and on that date the first High Court judge made an order allowing the appeal with costs in the presence of both parties. The defendants then applied to set aside the order of the first High Court judge and argued, inter alia, that they could do so by virtue of O 35 r 6 of the RHC. At pp 460–461, Kamalanathan Ratnam JC (as he then was) had this to say:

> On the question of merits the applicants' counsel's reason for not attending the hearing of the appeal on 21 June 1995 was because she had failed to enter the date in her diary.
>
> In response to this Mr Chin referred me to *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 and to *Tong Lee Hwa & Anor v Malayan Banking Bhd* [1978] 1 MLJ 257. In both cases the mistake of a solicitor was held to be insufficient reasons for granting special leave. The applicant's reply to these two cases is that the cases related to special leave.
>
> In my view, failure to enter the diary is not sufficient enough grounds to satisfy me that there are merits.
>
> In the circumstances, I dismiss the application with costs.

**[92]** Factually speaking, in the present appeal, the appellants defendants not only relied on the fact that there was a mistake in the failure to enter the hearing date in the firm's master diary as a ground for setting aside the judgment but have also advanced other grounds, of which I have more to say in a short moment.

**[93]** I will now briefly narrate the facts in *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors*. In that case, the solicitors on record for the defendants had informed the senior assistant registrar that he was discharging himself from representing the defendants. It was for this reason that no counsel for the first and third defendants was present on the date of the hearing which was scheduled on 20 November 1989. And the second defendant also informed the court that he had just appointed a new counsel. Unfortunately, the solicitors on record had not made any formal application to discharge himself. It was for this reason that the court considered that the same firm of solicitors was still the solicitors on record for the defendants on 20 November 1989. The first and third defendants applied to have their appeals reinstated and the first and second defendants also

A applied to enlarge time to apply for further arguments. In dismissing the defendants' applications, Zakaria Yatim J (as he then was) aptly said at p 116 of the report:

> In the present case, when I dismissed the appeal by the first and third defendants
B on 20 November 1989, there was a solicitor on record but he was absent. He had not filed any affidavit to explain or to give reasons why he was absent. As stated earlier the second defendant's averment for and on behalf of the first defendant in his affidavit is inadmissible. The explanation in the affidavit on the absence of the third defendant is not sufficient ground to grant the extension of time.
>
C In the absence of an affidavit giving sufficient grounds to justify an extension of time to enable the first and third defendants to apply for further argument, the second application was dismissed with costs.
>
> Application dismissed.

D

**[94]** I will now refer to the affidavit affirmed by Tunku Alina bte Raja Mohd Alias ('Tunku Alina') on 14 January 2008 as seen at pp 295–299 at Vol 2 of the record of appeal. In her affidavit, Tunku Alina sets out the reasons for the absence of the solicitors for the appellants defendants before the High
E Court on 13 January 2008. This was what she deposed to (in its original Malay language text):

> 2. Fail ini telah dikendalikan oleh seorang dari peguam saya bernama Encik Munir Shah bin Mohamed Husan, yang telah meletak jawatan
F semenjak 19/12/2007.
>
> 3. Oleh yang demikian, saya tidak mengetahui bahawa tarikh bicara bagi kes ini yakni pada 13/01/2008 dan 14/01/2008 telah *tidak* dimasukkan olehnya ke dalam diari firma kami (kemungkinan besar
G beliau telah terlepas pandang) dan dengan sebab itu, tiada peguam yang mewakili anak guam kami yakni Defendan-Defendan, pada tarikh bicara pada 13/01/2008 tersebut. Sekarang ditunjukkan dan dikemukakan kepada saya salinan dari diari firma kami bagi 13/01/2008 bertanda Ekshibit 'TAA-1'.
>
H 4. Saya hanya diberitahu oleh anak guam saya, yang telah menalipon saya pada malam 13/01/2008 apabila berita nasional di talivisyen melaporkan bahawa Mahkamah yang Mulia ini telah memasukkan penghakiman terhadap anak guam saya. Saya terus hadir di
I Mahkamah pada 14/01/2008 untuk membuat pertanyaan.
>
> 5. Sesungguhnya, perkara ini adalah suatu kesilapan yang amat dikesali oleh kami, dan kami memohon maaf terhadap Mahkamah yang Mulia ini kerana tidak hadir di Mahkamah pada 13/01/2008. Saya menyatakan bahawa ketidakhadiran anak guam saya dan saya di

Mahkamah yang Mulia ini pada tarikh perbicaraan adalah tidak disengajakan dan tidak dimaksudkan untuk menghina Mahkamah yang Mulia ini.

6. Kami telah membela kes ini dengan sepenuh hati dan luhur, dan tidak mungkin akan dengan sengaja engkar hadir di Mahkamah, melainkan disebab kesilapan yang berlaku ini. Perkara ini sesungguhnya tidak disangka oleh saya dan amat dikesali.

**[95]** And finally, Tunku Alina averred as follows (in its original Malay language text):

11. Oleh sebab-sebab yang dinyatakan di atas, saya memohon maaf sekali lagi terhadap ketidakhadiran peguam semasa tarikh perbicaraan, dan dengan rendah hati memohon supaya penghakiman yang dimasukkan terhadap Defendan-Defendan semasa ketidakhadiran Defendan-Defendan ataupun kami sebagai peguam, diketepikan dan suatu tarikh perbicaraan baru ditetapkan.

12. Saya menyatakan bahawa penghakiman ini amat memprasangkakan dan tidak adil kepada pihak Defendan-Defendan yang tidak berpeluang untuk membela tuntutan Plaintif-Plaintif manakala jika penghakiman ini diketepikan, Plaintif-Plaintif masih berpeluang untuk meneruskan tuntutan mereka terhadap Defendan-Defendan dalam perbicaraan penuh kes ini. Defendan-Defendan tidak akan dapat dipampaskan atas prasangka yang dialami oleh Defendan-Defendan sekiranya Defendan-Defendan tidak dibenarkan mengutarakan kesnya.

**[96]** Briefly, the reasons advanced by Tunku Alina may be stated as follows:

(a) that Munir — the solicitor who had charge of the matter, had resigned on 19 December 2007;

(b) that she did not know that the trial date for this matter scheduled on 13 January 2008 to 14 January 2008 was not entered into the firm's master diary by Munir and every possibility it was an oversight on the part of Munir;

(c) consequently, no counsel for the appellants defendants was present in court on the trial date on 13 January 2008;

(d) that her client had telephoned her when news about the judgment entered against the appellants defendants was broadcasted live over national television on the night of 13 January 2008 and she quickly proceeded to the Kota Bharu High Court on 14 January 2008;

(e) that it was a regrettable mistake on the part of the solicitors for the appellants defendants and they apologise for their non-attendance on 13 January 2008 and she said that the absence of her clients in court on the date of the trial was unintentional and was not meant to show disrespect to the Honourable Court;

(f) that the solicitors for the appellants defendants have diligently defended the case and it was improbable that they purposely refuse to attend court and that what had happened was unexpected and regrettable;

(g) for the aforesaid reasons, she apologised profusely for the absence of the solicitors on the date of the hearing and pray that the judgment entered after trial in the absence of the appellants defendants and their solicitors be set aside and a new trial be ordered;

(h) that the judgment entered after a trial in the absence of the appellants defendants was prejudicial and unfair in that the appellants defendants were deprived of defending the suit and in the event that the judgment is set aside, the respondents plaintiffs could still be afforded the opportunity to proceed with their claim by way of a full trial against the appellants defendants; and

(i) that the appellants defendants cannot be compensated for the prejudice which they suffer in the event they are not allowed to defend the suit.

**[97]** I need to refer, once again, to the case of *Burgoine v Taylor*. That was a case where the defendant was not represented at the trial of the action because his solicitors was ignorant that the action had, in fact, been transferred from one judge to another and therefore the solicitors had missed out the correct date of the trial before the new judge. That being the case, judgment was entered in favour of the plaintiff. The defendant's solicitors then proceeded to apply to set aside the judgment and the application was refused by the High Court judge who held that the solicitor had been guilty of gross negligence. On appeal, the judgment was set aside. Jessel MR had this to say in a rather short judgment (see pp 4–5 of the report):

> We think that the order asked for by the defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive. As a general rule, solicitors in my branch of the court consent to such an order as is now asked, and that such an application should be opposed is to me a novelty. Still, as the appellant was in default, he must pay the costs of the application to the court below, but no costs of the appeal.

**[98]** There is an adage which says that justice hurried is justice buried. Before the learned judge of the High Court only three witnesses were called, namely:

(a) SP1 Awang Soh bin Mohamad (see pp 144–195 of the appeal record at Vol 2);

(b) SP2 Othman bin Hamat (see pp 195–210 of the appeal record at Vol 2); and

(c) SP3 Tuan Fakhrur Razi bin Tuan Yusof (see pp 210–215 of the appeal record at Vol 2).

**[99]** These three witnesses gave evidence on 13 January 2008 and thereafter the learned judge of the High Court gave judgment in favour of the respondents plaintiffs and awarded those damages as alluded to earlier. It was a trial in the absence of the appellants defendants and their counsel. And in the words of Ralph Gibson LJ in *Packer v Denny* [1986] CA Transcript 310 as quoted by Leggatt LJ in *Shocked and another v Goldschmidt* and others at p 381 that:

> If a reasonable explanation is provided for the absence of the party at the hearing, and if the application is made in due time, justice normally requires that the judgment be set aside for the obvious reason that a trial is unjust if only one side is heard and the other side wishes to be heard ...

**[100]** In *Hock Seng Construction Sdn Bhd & Anor v Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, Justice Abdul Hamid Mohamad JCA (later the Chief Justice of Malaysia) in a dissenting judgment involving an appeal record that was not complete and the Court of Appeal by a majority dismissed the notice of motion for an extension of time to file a supplementary record of appeal to include certain evidence of the first respondent which had been inadvertently omitted in the original record of appeal and eventually the Court of Appeal, also by a majority, dismissed the appeal on the ground that there was no proper appeal before the court, had this to say at p 7 of the report:

> The reason is not difficult to understand: the main function of the court is to do justice not just to dispose of cases. At times it is unjust to dismiss an appeal without even hearing the arguments on merits purely on the ground, that due to the mistake of a solicitor, something that should have been done is not done.

**[101]** I agree with the submissions that the appellants defendants solicitors' oversight of the actual date of the trial before the learned judge of the High Court was a genuine mistake and not deliberate based on the following facts:

(a) that it is an undisputed fact that Munir who had charge of the matter had resigned on 19 December 2007;

A (b) that it is also an undisputed fact that Munir as the solicitor did not enter the date of the hearing into the firm's master diary;

(c) that the appellants defendants have defended the case diligently at all material times; and

B (d) that the absence of the appellants defendants or its representatives (bearing in mind that the second appellant defendant by the name of Ibrahim bin Ismail had passed away on 28 August 2006) would further support the appellants defendants' solicitors' contention that they were not aware of the hearing date.

C

**[102]** In my judgment, the learned judge of the High Court erred in law when he failed to accept the reasons for the absence of the appellants defendants and their solicitors on the date of the hearing. In my judgment, the mistake was genuine and truly unintentional. The absence too was not D deliberate.

THE SECOND CONSIDERATION

E **[103]** The plaintiffs respondents' claim against the appellants defendants can easily be summarised in this manner:

(i) all the 354 respondents plaintiffs contended that approximately on 20 September 2001 they discovered that there was fraud and/or conspiracy to commit fraud on the part of the second appellant F defendant (now deceased) or on the part of the first appellant defendant (Lembaga Kemajuan Tanah Persekutuan (FELDA)) based on a document which the respondents plaintiffs found which stated that the produce, namely, palm oil bunches was to be sold to the second appellant defendant (now deceased) at 18% KPG. The respondents G plaintiffs contended that they never agreed to such a standard of 18% KPG;

(ii) all the 354 respondents plaintiffs also contended that in conspiring to defraud them, the appellants defendants have altered the weighing system as well as the KPG level of the palm oil which caused the H respondents plaintiffs to suffer a loss of between RM30–RM50 per tonne of the palm oil sold to the second appellant defendant (now deceased).

I **[104]** I will now summarise the appellants defendants' defence in this way:

(a) the appellants defendants vehemently denied the allegations and contended that the respondents plaintiffs' palm oil produce was sold in blocks and carried by transport agents appointed by the respondents plaintiffs. And the process of weighing the palm oil was conducted in

accordance with the appropriate standard by skilled and certified graders that have been certified by the 'Lembaga Minyak Sawit Malaysia';

(b) the appellants defendants also contended that accurate and complete records of the sale of palm oil bunches have been recorded and such recordings can be found in the accounts which were handed over to the transporters of the palm oil bunches. These transporters were a co-operative network set up by the respondents plaintiffs themselves.

(c) that the representatives from the respondents plaintiffs have inspected the records for the sale of the palm oil bunches at the first appellant defendant's branch office and they did not register any objections;

(d) that the assessment at 18% KPG was arrived at in order to assess the quality of the palm oil bunches to ensure that it complied with the PORLA Manual Grading Requirements;

(e) that the appellants defendants have on numerous occasions informed the respondents plaintiffs of the poor quality of the palm oil bunches that were produced;

(f) that the weighing equipment at the second appellant defendant's factory has been inspected by officers from the Jabatan Timbang dan Sukat Malaysia and no problems were detected. It was for this reason that the appellants defendants contended that the allegations of fraud and conspiracy were unfounded and without merit;

(g) the appellants defendants contended that their records are available for inspection by the respondents plaintiffs and if at all the respondents plaintiffs suffered any loss it was mainly due to the poor quality of the palm oil bunches.

**[105]** It must be borne in mind that the main allegations of fraud, cheating and conspiracy against the first appellant defendant hinged entirely on the actions of the second appellant defendant (now deceased) as the representative or as an agent or as an employee of the first appellant defendant. These averments were pleaded by the respondents plaintiffs in their amended statement of claim dated 18 June 2007 as seen at paras 8, 14 and 16 thereof.

**[106]** Flowing from all these, with the demise of the second appellant defendant it would be doubtful whether the burden of proof of conspiracy, fraud and cheating have been adequately proved by the respondents plaintiffs bearing in mind that the burden of proof remains throughout on the shoulders of the respondents plaintiffs notwithstanding the absence of the appellants defendants and their counsel from court on 13 January 2008.

**[107]** With the demise of the second appellant defendant, the whole case against the first and the third appellants defendants cannot be sustained. The second appellant defendant as the principal conspirator has died. If a question is asked as to who had manipulated the weighing machine the answer would point to the second appellant defendant. And when the matter came up for hearing on 13 January 2008, there was no substitution of the second appellant defendant.

**[108]** The respondents plaintiffs made allegations of conspiracies against certain people who are not cited as parties in this suit. In his examination-in-chief, this was what SP2 Othman bin Hamat said in answer to questions 22 and 23 as seen at pp 208–209 of the appeal record at Vol 2:

> S22: Pada pengetahuan kamu, apakah motif konspirasi dan pakatan jahat antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?
>
> J: Motif mereka, dengan membeli sawit pada harga yang cukup murah, dan menjual dengan harga pasaran, akan membolehkan kilang mendapat untung yang tinggi. Dengan keuntungan yang tinggi, Pengurus akan mendapat komisyen yang besar, dan komisyen ini diagih-agih di kalangan mereka, iaitu kepada Pengurus Kilang sendiri, Pengurus Felda Kemahang 3 dan Naib Pengerusi.
>
> S23: Setelah misteri penggunaan COP pada P2 terdedah, pernahkah kamu berjumpa dengan Pengurus Felda Kemahang 3?
>
> J: Saya pernah bersemuka secara peribadi dengan Pengurus Felda Kemahang 3, mempersoalkan dia kenapa dia biarkan buah sawit peneroka dijual dengan harga yang tidak munasabah, sedangkan sewaktu Hamsidin ladang ini ladang terbaik, perahan mencapai KPG 20.50%, beliau jawab saya mahu cari makan. Beliau bagi tahu saya kalau saya duduk diam-diam, saya pun boleh sertai mereka.

**[109]** The evidence was so unsafe, yet the learned judge of the High Court found that there was fraud and conspiracy. It must also be borne in mind that the learned judge of the High Court did not address the issue of whether the absence from court on 13 January 2008 was deliberate or otherwise.

**[110]** In the affidavit of reply of Wan Rohimi bin Wan Daud that was affirmed on 18 January 2008 as seen at pp 304–319 of the appeal record at Vol 2, there was a categorical averment that the respondents plaintiffs have abandoned their claim against the second appellant defendant. At pp 314–315 of the appeal record at Vol 2, Wan Rohimi bin Wan Daud deposed to the following set of facts:

(i) Penghakiman bertarikh 13/1/2008 dalam tindakan ini hanya dimasukkan terhadap Defendan Pertama dan Ketiga sahaja dan tidak melibatkan Defendan Kedua yang telah meninggal dunia;

(ii) Oleh itu, Plaintif-Plaintif sebenarnya telah mengabaikan (abandon) tuntutan ini terhadap Defendan Kedua dan pendirian untuk mengabaikan (abandon) tuntutan terhadap mana-mana Defendan adalah dibenarkan oleh undang-undang;

(iii) Tambahan pula, kausa tindakan ke atas Defendan Kedua adalah berasas tort untuk frod, konspirasi dan pecah amanah yang tidak boleh dipindahkan kepada mana-mana pewaris. Ia bukan satu tuntutan berkenaan hutang atau pemecahan mana-mana kontrak yang mengikut wasi-wasi.

**[111]** It must be borne in mind that Wan Rohimi bin Wan Daud affirmed that affidavit in reply as counsel for the respondents plaintiffs.

**[112]** It is not the duty of the appellants defendants to substitute or add any other person after the death of the second appellant defendant. The respondents plaintiffs have decided and picked who to sue. Both the first and third appellants defendants must act through an individual in the person of the second appellant defendant. As a joint tortfeasor, when the second appellant defendant died, that would be the end of the matter.

**[113]** A company can only act through its agent. With the demise of the second appellant defendant, the issue of conspiracy would die a natural death. Without the second appellant defendant, where is the conspiracy? As the principal tortfeasor, the second appellant defendant has died and according to Wan Rohimi bin Wan Daud in his affidavit in reply, the respondents plaintiffs have abandoned the claim against the second appellant defendant. That being the case, how could the learned judge of the High Court decided the case against the appellants defendants?

THE THIRD CONSIDERATION

**[114]** Here, there was no delay by the appellants defendants' in applying to set aside the judgment after a trial in the absence of the appellants defendants and their counsel. Delay was not an issue at all. The appellants defendants had acted promptly and timeously in filing the said application.

THE FOURTH CONSIDERATION

**[115]** According to the learned judge of the High Court, the respondents

plaintiffs would be prejudiced if the application to set aside the judgment after trial in the absence of the appellants defendants and their counsel was allowed because the respondents plaintiffs have suffered a long time due to the appellants defendants' actions. With respect, it was not within the purview of the learned judge of the High Court to make a finding as to the nature of the purported suffering of the respondents plaintiffs.

**[116]** It must be borne in mind that the respondents plaintiffs' claim was for damages. And the claim for damages must be proved by each and every one of the 354 respondents plaintiffs before the High Court. Per se 'class action' suit does not exist in Malaysia. Each and every one of the respondents plaintiffs has a distinct and separate contract with the first appellant defendant. And this suit too was not filed in the form of a representative action. That being the case, each respondent plaintiff, in the High Court, must give evidence of the loss suffered. The reference to a period of long suffering by the learned judge of the High Court was not predicated on any cogent evidence placed before the High Court be it by way of documents or by way of oral evidence during the course of the trial in the absence of the appellants defendants and their counsel.

**[117]** In sharp contrast, the appellants defendants were prejudiced when they were deprived of the opportunity to defend the action. On the other hand, if the second appeal is allowed and the case be remitted back to the High Court for a retrial, the respondents plaintiffs would still have the opportunity to continue with their claim.

**[118]** It is comforting to know that the first appellant defendant has deposited RM7m into court. According to learned counsel for the appellants defendants that sum of money would remain there until this court orders a retrial. Learned counsel for the appellants defendants even ventured to suggest that that sum may be put in the joint name of both solicitors, presumably as a gesture of goodwill. Finally, learned counsel for the appellants defendants submitted that the judgment of the learned judge of the High Court ought to be set aside and a retrial ordered and that the costs here and below be borne by the appellants defendants. Indeed all these facts should dispel any fear that the respondents plaintiffs would be prejudiced.

ANALYSIS

**[119]** It seems to me that the appellants defendants are merely seeking to enforce their right to be heard and present their case and defend the action. They want to have their day in court. To deprive the appellants defendants of defending the action would be unjust and would likely lead to a real miscarriage of justice. According to the Court of Appeal of Singapore in the

case of *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 that apart from the 'broad-ranging factors' as set out by Leggatt LJ in *Shocked & Anor v Goldschmidt & Ors*, another overriding consideration was added (see p 688) and that was: A

> whether there is a likelihood that a real miscarriage of justice has occurred. B

**[120]** There are exceptional reasons and other countervailing factors in favour of setting aside the judgment entered after trial in the absence of the appellants defendants and their counsel. All these must be considered in order to avoid a 'real miscarriage of justice'. In my judgment, there was an improper judicial appreciation of the evidence by the learned judge of the High Court. On this point, reference should be made to the case of *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), a decision of Steve Shim CJ (Sabah and Sarawak). There his Lordship sets out the law in this way (see pp 10–11 of MLJ and p 320 of CLJ): C D

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test. E F G

**[121]** May I add that the trial court must also test the evidence of a particular witness against the probabilities of the case. And this can only be achieved if both parties attend the hearing and present their versions accordingly. H

**[122]** The appellate court is certainly free to reverse the conclusions of the trial court if the grounds given by the trial court are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears from the evidence that the trial court in reaching its decision has unmistakably not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight of the evidence and impact of the circumstances admitted or proved (*Watt or Thomas v Thomas* [1947] AC 484, (HL)). I

**[123]** But a distinction has to be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In regard to the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and expeditiously form an independent opinion than in the case of the former (*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326; and *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87).

**[124]** Using these authorities as useful guidelines, I arrive at the conclusion that the learned judge of the High Court was plainly wrong when he failed to judicially appreciate the following flaws:

(a) admitted documents that were not previously disclosed;

(b) accepted hearsay evidence; and

(c) failed to consider that each of the respondents plaintiffs must prove the loss suffered.

**[125]** I shall now consider these flaws one after another.

ADMITTED DOCUMENTS THAT WERE NOT PREVIOUSLY DISCLOSED

**[126]** On 13 January 2008, at the trial of the action in the absence of the appellants defendants and their counsel, the respondents plaintiffs produced:

(a) the bundle of documents in bundle 'I' that had not been served on the appellants defendants' solicitors nor agreed to by the appellants defendants' solicitors prior to the trial (see the appeal record at Vols 9–10 at pp 1040–1354);

(b) and the learned judge of the High Court admitted documents from the common bundle of documents at bundle 'G' and bundle 'H' where the authenticity and contents of the documents were disputed (see the appeal record at Vol 2 at pp 144, 193 and 202); and

(c) the respondents plaintiffs also produced ten (10) other exhibits without calling the makers of the said documents to attest to the veracity of the said documents (see the appeal record at Vols 7–10).

**[127]** Sections 61 to 73A of the Evidence Act 1950 deal with documentary evidence and these sections would surely curtail the admission of those documents which the respondents plaintiffs sought to admit. *Sarkar's Law of Evidence* Vol 1 at p 1180 carries the following germane passage which merits reproduction:

Secondary evidence should not be accepted without a sufficient reason being given for non-production of the original (*Syed Abbas v Yadeen* 3 MIA 156). A document should not be considered as proved because its genuineness is not disputed by the opposite party (*Kirteebash v Ramdhone* BLR Sup Vol 658). The documents upon which reliance is sought to be placed must be brought on records of the case legally. Documents do not prove themselves (*Mostt Rajwati Devi v The Joint Director, Consolidation, Govt of Bihar, Patna* A 1989 Pat 66, at p 67). Every document should first be started by some proof or other before the person who disputes that document can in any way be considered bound by it (*Reazoonnissa v Bookoo* 12 WR 267). A person can be allowed to depose to the receipt of letters from another or that he took certain action on them, but his evidence is no proof of the contents of the letters (*Firm Chunni v Firm Sheo* A 1943 A 370). A letter filed by a party may be looked into without any further proof at the instance of the opposite party (*Rudnap Export Import v Eastern Associates Co A* 1984 Del 20 at p 29). Oral admissions as to contents of a written contract are not relevant if the document is inadmissible for want of registration (*Shk Ibrahim v Parvata* 8 Bom HCR 163). Whatever the law may have been before the passing of the Act, the rules contained in this enactment should now be strictly observed. 'S 61 lays down that the contents of documents may be proved either by the primary or by secondary evidence' (*Ram Pd v Raghunandan* 7 A 738 at p 743).

**[128]** At the local scene, we have the case of *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 to consider. There Shankar J (as he then was) aptly said at p 381, and it is still good law:

In the first place it is the duty of counsel engaged in a case to see that the documentary evidence upon which he relies is properly tendered in court and proved. After they have been proved he should also see that when admitted into evidence the documents are properly marked as required by law. Reference may be made in this connection to *Immam-Ud-Din v Sri Ram Perbhu Dial* AIR 1928 Lah 142.

A document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as exhibit: See in this connection Secretary of *State v Sarla Devi* AIR 1924 Lah 548, *Feroze Din v Nawab Khan* AIR 1928 Lah 432 at p 434 and *Baldeo Sahai v Ram Chander & Ors* AIR 1931 Lah 546 at p 550. Whilst these Indian authorities are only of persuasive value, the propositions which they set out are really elementary. When the hearing began in this case the old Subordinate Court Rules 1950 were in force. By the second hearing the Subordinate Court (Amendment) Rules 1980 had already come into force (vide PU(s) 106/81 on 1 April 1981) but the relevant O 19 r 8 and the new O 28 r 14 (which has its equivalent in the Rules of the High Court O 35 r 8) were all to the same effect. Documents put in evidence were to be marked as exhibits and retained by the court. But what has not been specifically stated and should be understood by all concerned is that a document cannot be admitted into evidence and marked as such until it has been properly proved.

**[129]** And continuing at p 382 of the same case, Shankar J (as he then was) had this to say:

> The issue here appears to relate to the question as to whether agreeing a document merely dispenses with proof of its existence or execution, or whether it goes further and dispenses with proof of the contents of the documents. The strictures passed by the judge in the last of the aforementioned judgments on Sharma J make somewhat sad reading. Certainly the law must be that once a document is included in an agreed bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be proved, in the absence of any specific admission of the facts therein contained. That this is so may readily be appreciated when one considers two police reports in an agreed bundle each giving a diametrically opposite version of how an accident took place. The version of the accident is generally not agreed and in issue. To that extent the makers of the document may be subject to cross-examination to establish where the truth of the matter lies. So whilst it is not necessary to prove the documents, it would still be necessary to prove the truth of the contents of the documents.

**[130]** It is now apparent that the learned judge of the High Court has violated the rules relating to the admission of evidence when he made a finding in favour of the respondents plaintiffs. In the absence of the solicitors for the appellants defendants on the date of the trial, a higher duty was placed on both the respondents plaintiffs and the learned judge of the High Court to abide strictly to the procedural rules relating to the admissibility of the documents that were produced and marked as exhibits so that the sanctity of the written judgment of the learned judge would be preserved and free from attack. But sad to say, this was not done.

**[131]** The learned judge of the High Court freely admitted documents without calling the makers of the said documents. And documents not previously agreed to by the parties were unilaterally admitted without calling for the makers of the said documents to testify. All these are elementary and should be adhered to. For these reasons, I say that the judgment of the learned judge of the High Court is unsafe to rely upon and the second appeal should be allowed.

HEARSAY EVIDENCE

**[132]** The notes of evidence would show that hearsay evidence was admitted contrary to the provisions of the Evidence Act 1950. I will now reproduce the hearsay evidence in question.

**[133]** For starters, I will begin by referring to the evidence of SP1 Awang Soh bin Mohamad:

(a) See the record of appeal at Vol 2 at p 146:

S.6.: Adakah pada pengetahuan kamu, peneroka-peneroka lain diberikan salinan perjanjian tersebut?

J: Saya amat pasti peneroka-peneroka lain juga tidak dibekalkan dengan salinan perjanjian tersebut.

(b) See the record of appeal at Vol 2 at p 149:

S.15.: Pada pengetahuan kamu, ada tak peneroka guna baja sendiri atau membeli baja di luar pengetahuan Felda?

J: Tak ada, kerana peneroka tidak mampu. Lagipun baja Felda sudah mencukupi dan mutunya telah disahkan oleh Felda sendiri.

(c) See the record of appeal at Vol 2 at p 150:

S.21.: Sepanjang pengetahuan kamu, adakah pernah terdapat mana-mana peneroka di Felda Kemahang 3 yang pernah dikenakan hukuman atas kesalahan menyalahgunakan baja?

J: Sepanjang pengetahuan saya, tidak pernah ada.

(d) See the record of appeal at Vol 2 at p 161:

S.58.: Berdasarkan Fasal 9 perjanjian ini, apakah peranan kilang sawit Felda pada waktu itu?

J: Pada pengamatan saya, kilang sawit Felda pada waktu itu tidak membeli buah sawit peneroka, tetapi sebagai agen yang menjual hasil sawit kami dan mengambil melalui upah-upah yang dipotong seperti yang diperuntukkan melalui Fasal 9 perjanjian tersebut sahaja.

(e) See the record of appeal at Vol at p 163:

S.64.: Pada pandangan kamu, kenapa Defendan Ketiga berbuat demikian?

J: Saya percaya sebagai sebuah entiti korporat yang hanya mementingkan keuntungan, Defendan Ketiga hanya mementingkan keuntungan dan prestasi keuntungan tahunan kilangnya sahaja. Lagi murah mereka beli buah sawit kami, mereka akan dapat lebih untung. Apabila kilang mendapat untung yang lebih, maka pekerja kilang termasuk grader di kilang, dan lebih-lebih lagi pengurus kilang akan dibayar bonus atau komisyen yang lebih tinggi.

(f) See the record of appeal at Vol 2 at p 187:

S.127: Apakah yang kamu tahu tentang kilang?

J: Kilang tidak dapat perahan maksimum sekiranya kerja-kerja mengukus tidak dijalankan dengan sempurna iaitu tidak mengikut masa yang ditetapkan. Buah tidak akan relai dari tandan, minyak tidak

akan keluar semaksimum yang boleh. Jika berlaku kebocoran paip saluran minyak, minyak akan mengalir ke takungan buangan, alat pemerah sudah lama tidak diservis atau diganti. Perkara ini boleh menjatuhkan perahan minyak.

**[134]** Next, I will refer to the evidence of SP2 Othman bin Hamat:

(a) See the record of appeal at Vol 2 at pp 204–205:

> S.21: Boleh kamu terangkan dengan lebih lanjut tentang konspirasi dan pakatan antara Pengurus Felda Kemahang 3, Naib Pengerusi dan Pengurus Defenden Ketiga?
>
> J: Naib Pengerusi adalah wakil peneroka yang sepatutnya menjaga kepentingan peneroka. Pengurus Felda Kemahang 3 juga sepatutnya menjaga kepentingan peneroka. Apa yang berlaku, Naib Pengerusi dan Pengurus Felda Kemahang 3, telah berpakat dengan Pengurus Kilang untuk membeli buah sawit kami dengan harga yang tak munasabah. Oleh kerana Pengurus Felda Kemahang 3 dan Naib Pengerusi sudah sepakat dengan Pengurus Kilang, maka Pengurus Felda Kemahang 3 dan Naib Pengerusi tidak akan membuat aduan sekali pun terdapat banyak aduan dari peneroka. Bahkan mereka bertindak dengan lebih teruk lagi dengan mengarahkan COP pada P2 dibuat ke atas resit jual beli buah sawit kami.

(b) See the record of appeal at Vol 2 at pp 206–208:

> S.24: Boleh kamu terangkan dengan lebih jelas tentang pakatan dan konspirasi Defendan-Defendan?
>
> J: Saya percaya mekanisma pakatan dan konspirasi mereka adalah seperti berikut:
>
> (i) Atas hasutan dan dorongan Defendan Kedua, selaku kakitangan dan ejen Defendan Pertama, Defendan Kedua dengan palsunya membuat akuan dalam 'Akuan Penerimaan BTS' bahawa 'Penjual mengakui hantaran mutu BTS di bawah KPG 18%'. Penjualan BTS ini adalah di atas dasar kehendak penjual dan penjual bersetuju KPG yang dibayar;
>
> (ii) Atas dorongan dan konspirasi Defendan Kedua selaku kakitangan dan ejen Defendan Pertama, Defendan Ketiga dengan berniat jahat menurunkan kadar KPG bertentangan dengan kadar yang sepatutnya untuk menurunkan harga setiap tan buah/hasil sawit yang perlu dibayar kepada Plaintif-Plaintif;
>
> (iii) Defendan Kedua selaku kakitangan dan ejen kepada Defendan Pertama, telah berkonspirasi dengan Defendan Ketiga untuk menyalahgunakan kaedah timbangan untuk memastikan gred KPG diturunkan;

(iv) Defendan Ketiga membeli dan/atau Defendan Kedua mengarahkan peneroka menjual buah/hasil sawit Plaintif di bawah KPG yang sepatutnya tanpa pengetahuan Plaintif-Plaintif;

(v) Defendan Kedua selaku kakitangan dan ejen Defendan Pertama membuat representasi yang salah tentang hak Plaintif-Plaintif berkenaan dengan hasil jualan sawit tersebut;

(vi) Defendan Kedua telah mengkhianati kepercayaan yang diberikan oleh Plaintif-Plaintif dan gagal melindungi kepentingan dan kebajikan Plaintif-Plaintif;

(vii) Defendan Kedua selaku ejen dan kakitangan Defendan Pertama dan Ketiga telah secara bersesama dan berasingan menipu Plaintif-Plaintif serta berkonspirasi untuk menipu Plaintif-Plaintif dalam urusan jualbeli buah/hasil sawit dan telah menyebabkan kerugian kepada Plaintif-Plaintif.

**[135]** It is apparent that the evidence of SP1 Awang Soh bin Mohamad hinged on circumstantial evidence and was not within his own actual knowledge. While the evidence of SP2 Othman bin Hamat sought to prove the ingredient of motive for the purported acts of cheating, conspiracy to cheat and fraud and was very speculative and was not within his own actual knowledge. What is pertinent to note is this. That there was no independent corroboration of the evidence of SP2 Othman bin Hamat.

**[136]** The reception of hearsay evidence can only be described in one word. Unfortunate. When a witness testifies in court about what he heard from a third party who is not called as a witness that is hearsay evidence and it is inadmissible to prove the truth of the fact stated. In *Leong Hong Khie v Public Prosecutor; Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206, Seah FJ had this to say about hearsay evidence (see p 208):

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence. To quote Lord Normand in *Teper v R* [1952] AC 480 at p 486:
>
> > The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

In our opinion, another reason is the danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness' testimony.

EACH OF THE RESPONDENTS PLAINTIFFS MUST PROVE THE LOSS SUFFERED

**[137]** All the 354 respondents plaintiffs are claiming damages and they must prove them. *McGregor on Damages* (16th Ed) at p 236 sets out the law on damages in this way:

> A PLAINTIFF claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; this situation is illustrated by *Dixon v Deveridge* [1825] 2 C & P 109 and *Twyman v Knowles* [1853] 13 CB 222.

**[138]** Of course, if a particular plaintiff has suffered damage that is not too remote, he must be restored, so far as money can do it, to the position he would have been in had that particular damage not occurred (*Robinson v Harman* (1848) ER 154; 1 Ex 850; *Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301 at p 307; *The 'Edison'* (1933) 45 Ll L Rep 117 at pp 128–129, and *Sunley (B) and Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740 at p 745).

**[139]** In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, Edgar Joseph Jr J (as he then was) spoke of the general principles governing damages in these erudite terms (see p 366 of the report):

> A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v C Czarnikaw Ltd (The Heron II)* [1969] 1 AC 350).

**[140]** Continuing at p 369 of the report, His Lordship Edgar Joseph Jr J (as he then was) had this to say:

> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89 quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17, namely, that:

> The plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

> Accordingly, all I can do is to make an award of nominal damages of US$500 that being the currency of the contract (see *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487) which I hereby do.

**[141]** In *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777, Edgar Joseph Jr FCJ, speaking for the Federal Court, again quoted, with approval the passage from Lord Goddard in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89.

**[142]** Finally, Abdul Malek Ahmad JCA (who later rose to be the President of the Court of Appeal) in *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 at p 85 had this to say:

> As to the question whether the defendant has proved its loss, the learned trial judge said that the law is clear that the burden of proving both the facts and the amount of damages lies on the person seeking damages before he can recover them, citing *Bonham-Carter v Hyde Park Hotel Ltd* 64 TLR 177 and *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.

**[143]** The primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him. Whereas the secondary purpose of awarding damages is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (*Bell v The Midland Railway Company* (1861) ER 142; 10 CB (NS) 287 at p 308; *Cassell & Co Ltd v Broome & Anor* [1972] AC 1027; *Rookes v Barnard & Ors* [1964] AC 1129).

**[144]** Exemplary damages would normally be ordered when the conduct of the wrongdoer has been outrageous as to merit such a punishment. Thus, when the conduct of the wrongdoer discloses malice, cruelty, fraud, insolence, etc, then exemplary damages would be ordered.

**[145]** The learned judge of the High Court wrote his judgment in the Malay language and the English language translation has been provided to this court. I shall refer to the English language translation of the learned judge's judgment. In regard to the evidence of SP3 Tuan Fakhrur Razi bin Tuan Yusof, this was what the learned judge of the High Court had to say:

PW3 then gave evidence on the calculations of the losses sustained by the plaintiffs due to the deception and conspiracy by the defendants. According to PW3 all 354 plaintiffs sustained losses of RM7,146,291 in total. The basis of the calculation is the difference in the price of fruit per tonne which ought to have been paid to the settler multiplied by the total number of tonnes of fruit actually sold to the FELDA factory. The formula is the actual price of palm fruit per tonne according to the quality of the fruit less (–) the price of palm fruit per tonne according to the grade valuation by the FELDA factory multiplied (x) by the total volume.

The grade of palm fruit valued by the FELDA factory was in the region of KPG 17.5%. The price per tonne of palm fruit was RM250. KPG 1% is equivalent to RM14.28 (250/17). The grade valued by the Felda factory was KPG 17.5%. The KPG ought to have been graded as 21%. The difference in the KPG which ought to have been paid to the plaintiffs is 21% – 17.5% = 3.5%. Total loss for the year 1997 is 56.27 x 21,166.67 — RM1,191.048.52 (56.27 is the price difference. 21,166.67 is the volume in tonnes). The loss incurred by the plaintiffs for the years 1997–2002 is RM1,191,048.52 x 6 years = RM7,146,291.12.

The court finds that the sum of the calculations done by PW3 is simple, clear and correct.

**[146]** And the learned judge of the High Court proceeded to state that:

(6) for the first issue, the court is of the view that the plaintiffs have succeeded in proving their claim against the defendants.

(7) In respect of the second issue, the court accepts the calculations done by PW3. The calculation is simple, reasonable and convincing. Therefore the court allows the plaintiffs' claim as per the calculation done by PW3.

**[147]** It can be surmised that the learned judge of the High Court had accepted wholesale the testimony of SP3 Tuan Fakhrur Razi bin Tuan Yusof in regard to the respondents plaintiffs' claim for damages. His Lordship accepted the testimony of SP3 that the alleged discrepancy in the price of oil palm fruit bunches per tonne at the rate of RM250 per tonne when there was no documentary evidence for this amount for three years from 1997 to 2000 before the learned judge. I wonder where did SP3 get the rate of RM250 per tonne from. It seems to me that SP3 wrote down the figure of RM250 per tonne, so to speak, and threw them before the learned judge of the High Court and asked to be given that amount without proving it. That cannot be right.

**[148]** In fact, there was no documentary evidence before the learned judge of the High Court to support the actual loss or estimated loss suffered by each individual respondent plaintiff.

**[149]** The learned judge of the High Court also failed to take into account the failure of learned counsel for the respondents plaintiffs to call each individual respondent plaintiff to give evidence of the actual loss alleged to be suffered by each individual respondent plaintiff bearing in mind that individually each of them would have suffered a different quantum of loss. It must be borne in mind that individually each of them may have different grades of fruits that have been harvested.

**[150]** For all these reasons, the learned judge of the High Court misdirected himself during the course of the trial and he failed to 'judicially appreciate the evidence' that was put before him.

**[151]** As promised, I will now say something about representative action. Order 15 r 12 of the RHC makes reference to representative proceedings and it is worded as follows:

12 Representative proceedings (O 15 r 12)

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the

judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

**[152]** The present action should have been filed in the form of a representative action under O 15 r 12 of the RHC bearing in mind that there are 384 respondents plaintiffs. The first respondent plaintiff in the amended statement of claim goes by the name of Awang Soh bin Mamat bearing identity card No 510914-03-5139. The respondents plaintiffs first witness was SP1 and his name is Awang Soh bin Mohamad bearing identity card No 510914-03-5139. It appears that two persons are having the same identity card number. Awang Soh bin Mamat may be the same person as Awang Soh bin Mohamad but there is no evidence to this effect. However, relying on the amended statement of claim it should be Awang Soh bin Mamat. See the amended statement of claim at p 52 of the appeal record at volume 1 as well as the notes of evidence at p 144 of the appeal record at Vol 2.

**[153]** Be that as it may, SP2 Othman bin Hamat is listed as respondent plaintiff number 304 in the amended statement of claim at p 71 of the appeal record at volume 1. While SP3 Tuan Fakhrur Razi bin Tuan Yusof is listed as respondent plaintiff number 101 in the amended statement of claim at p 58 of the appeal record at volume 1.

**[154]** Nowhere in the amended statement of claim is there an assertion that these three witnesses SP1, SP2 and SP3 are representing the other remaining respondents plaintiffs as required under O 15 r 12 of the RHC. Inter alia, it is for these reasons that I hold that the action was not a representative action.

**[155]** Order 15 r 12 of the RHC envisages a situation where one action would determine the rights of a number of persons against another party called the defendant. According to Lord Shand in *The Duke of Bedford v Ellis & Ors* [1901] AC 1 at p 14, where numerous persons have 'the same interest in one cause or matter' then 'one or more of such persons may sue or be sued... on behalf or for the benefit of all persons so interested'. In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332, Low Hop Bing J (now JCA) held, inter alia, that a representative action is regulated by O 15 r 12 of the RHC.

**[156]** There are four requirements to r 12 of O 15 of the RHC. Firstly, there must be numerous persons involved. Secondly, there must be the same common interest in regard to the subject matter. Thirdly, the relief sought must not be personal but must be beneficial to the class as a whole. Fourthly, the parties represented must be of a defined class and it is not difficult to determine whether a person is a member of that class. See *Markt & Co Ltd v Knight Steamship Co Ltd*, *Sale & Frazar v Knight Steamship Co Ltd* [1910] 2 KB 1021 at p 1040; *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624; and *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427.

**[157]** The amended statement of claim makes no reference to O 15 r 12 of the RHC. This was not the case where SP1 together with SP2 and SP3 are suing the appellants defendants on behalf and for the benefit of the other respondents plaintiffs. That being the case, each of the 384 respondents plaintiffs should testify in court bearing in mind that each of them may have different grades of fruits that have been harvested and, consequently, each one of them too may have different quantum of damages.

CONCLUSION

**[158]** For the reasons adumbrated above, I would allow this appeal and I make an order that the costs incurred below and here to be borne by the appellants defendants. I also set aside all the orders of the learned judge of the High Court and a retrial is hereby ordered before another judge of the High Court. Deposit to be returned to the appellants defendants.

**[159]** As a matter of courtesy I have shown my draft judgment to James Foong FCJ and Abdull Hamid Embong JCA.

*Appeal dismissed with costs.*

Reported by Andrew Christopher Simon